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PREFACE

This pamphlet, constitutional rather than political, does not directly deal with any of the chief political problems of the day, such as the nature of the British connection, the relations of the Hindus and Mussalmans, the position of the Indian States *vis-à-vis* the Government of India and the re-distribution of provinces. Nor does it profess to present an exhaustive constitution for the future. It merely offers a few suggestions on the plan and scope of the Indian Constitution, on the assumption that a change in the democratic direction is imminent. I have reduced the historical and philosophical matter and the footnotes to a minimum. But my debt to political writers of various schools and countries will be apparent from every page. My particular obligations are due to my tutor, Prof. H. J. Laski, to Prof. L. T. Hobhouse, Sir William Beveridge and other teachers of the London School of Economics and Political Science, with whom I studied Sociology, Politics and Public Administration for nearly three years. Similar acknowledgments are due to the organisers of Summer Lectures at Geneva in 1924, 1925 and 1926. To Prof. Alfred and Mrs. Zimmern I owed facilities for studying the practical working of institutions in England, France, Switzerland and Czecho-Slovakia. To the Hertz family of Hamburg I am grateful for opportunities of political observation in various parts of Germany. Other friends kindly smoothed my paths in Belgium, Holland and Austria. Nearer home, I have had the advantage of

reading the Report of the Constitution Committee of the All Parties' Conference issued in the middle of August, 1928. I am grateful to Dr. Tara Chand, M.A., D.Phil. (Oxon.), for valuable criticism; to Mr. Ilyas Ahmad, M.A., for useful suggestions; to Pandit Ram Narain Gurtu, B.A. (Oxon.), Bar.-at-Law, for retouching the draft of several chapters; and to Mr. Ram Chandra Tandan, B.A., LL.B., for passing the proofs and, along with other friends, for assistance in preparing the MSS. for the press.

October, 1928 BENI PRASAD.

A Few Suggestions
on
The Problem of the Indian Constitution

CHAPTER I

INTRODUCTORY

A World Movement.

Since the close of the World War in 1918, the framing and alteration of Instruments of Government have formed one of the most notable features of political life in Europe. There is hardly a country in Western Europe which retains intact its constitution of 1914, while those in Central and Eastern Europe have set up brand new laws and institutions. Turkey, Egypt, Persia, Afghanistan and China are in the throes of a new birth. Japan has just witnessed two or three important changes. The United States is endeavouring to carry out some far-reaching administrative alterations. On either side of the Atlantic, political thought has largely concerned itself with constitutional devices to regulate and harmonise the social and economic forces. There is hardly a country in which thoughtful people are not inquiring whether their political institutions answer adequately to the demands

of modern existence. Sidney and Beatrice Webb, Duguit, Bryce, Lowell, Laski, Lippman, Barthelemy, Cole, Preuss are a few of the numerous scholars whom the march of events has prompted to subject political needs and remedies to philosophical analysis and to suggest fresh plans of institutional organization. In the present interdependence of the world, the ferment could not have left Indian life and thought untouched. Long processes of development seem suddenly to have come to a head during the last ten years. It is generally assumed that Indian government requires early and profound change. A number of constitutional schemes and draft bills have already appeared and a fresh crop may be expected in the immediate future. Now that public opinion has to weigh the respective merits of the different proposals, it may be desirable to examine the fundamental constitutional issues in the light of first principles as well as of the past and present political experience of mankind. A scientific study may serve to clarify the issues, to educate opinion on right lines and to bring out practical suggestions.

Need of Forethought.

There are those in India, as in other countries, who ridicule constitution-mongering as a mere pastime, idle, futile and at best premature. They seem to believe that a practical instrument of government is best forged at high pressure, amidst the actual or imminent collapse of the old order. But history offers an unmistakable warning against refusing to think until there is no time to think. In the chequered annals of France since 1789 there are crises resulting in disorder and suffering, which reasoned and well-thought out projects of constitutional change might have averted. So, too, if the

German liberals had worked out, and agreed upon, lines of constitutional advance beforehand, they might not have been caught unprepared in the whirlwind of 1848. As it was, they wrangled for months at Frankfurt and allowed reaction to rally its forces and blow their castles in the air. The fact that India expects a peaceful transformation and not a violent cataclysm, renders it all the more necessary to think out the principles and details of a future constitution. The psychological moment, anticipated by advocates of the "high pressure" theory may never arrive, or if it arrives in the wake of highly-strung nerves and a raging and tearing agitation, it may only inflict an ill-considered, unworkable scheme on the country. A constitution is not a pudding (to vary a phrase of the Abbé Sieyès) which can be instantly prepared to order.

Scientific Thinking.

As a general principle of social or political life, it must be understood that the Great Society (as Graham Wallas has called it) with its universal ramifications of large-scale industry and commerce, of international diplomacy and world-wide interdependence, no longer permits of a policy of drift. Instinct, emotion or intuition, howsoever true or powerful, no longer suffice to guide men through the complexities and labyrinths of a vast social fabric, liable to numberless impacts and alterations from all sides. England has long prided herself on her capacity of "muddling through" but her thinkers are now proclaiming the sovereign need of planning the common life. Man, who has organised so much else, must now seriously undertake the organisation of social thought, if he is not to perish in the anarchy of forces he has managed to let loose on himself. Nowhere is systematic, organised thinking so imperatively neces-

sary to-day as in the sphere of government. Anyone who surveys the progress of the world as a whole during the last two centuries, will realise that progress in science, and in its untold applications to human purposes—means of communication, industry and warfare, for instance—has outrun political progress to an appalling extent. The art of government has lagged behind all other practical arts; the science of government is still so fluid and indefinite, often so perverted by passion and prejudice as hardly to deserve the name. Social and economic change has moved by rapid strides, "has moved almost like an avalanche, like a cataclysm," but Government, far from keeping pace with it, is steeped in old-world formulæ.

Significance of Government.

Government, always a factor of the first importance in associated life has enormously increased its significance by that vast extension of state-activity, which constitutes the most striking feature of the modern age. It is due primarily to the accumulation of accurate, scientific knowledge, to the imperative need of expert management, to the intricacies and complexities of life and their urgent call for co-ordination, and to the necessity of acting on a large scale. Everywhere the state has become or is becoming a mighty spirit pervading all manifestations of corporate life. It profoundly affects every aspect of the economic and intellectual activities of the community. It is no longer negative—a mere hindrance to hindrances, as Kant said—it has become positive, working under a collectivist theory of society and under what an eminent jurist, Dean Pound, has termed the "engineering" theory of law, implementing social purposes, by continuous enactments and regulations. It is in harmony

with the world-wide trend of events that during the last twenty years, social legislation has rapidly increased in volume in India and that a number of social measures are at present on the anvil. Every step in the transfer of power to the people, is bound to intensify the tendency and launch the government on a career of ever-increasing activity. Modern statism by the way, accords in principle, with the political thought and activity of ancient India which frankly recognised the leadership of government in moral and material life.[1] It is essential that the organs of Government, should be so shaped and provided with such accessories as to answer the needs of liberal and progressive legislation and pure, efficient administration. All who are interested in the economic advancement, social amelioration and intellectual uplift of the country should seriously think on the impending political changes, which are sure to affect every branch of national life. To the growth of governmental activity there is another side which has lately roused grave misgivings. It multiplies the number of functionaries and departments, creates a bureaucracy, a machine. It may discourage initiative and self-help and give rise to all those evils which led Carlyle to curse "the huge demon of mechanism." If the hard facts of modern life must make the government ubiquitous, it is none the less necessary to think out remedies for the incidental evils of mechanization.

It may be emphasised at the outset that every discussion on government should be conducted in the manner that we associate with scientific inquiry in general.

1 For a detailed treatment of the subject, see my *Theory of Government in Ancient India* and *The State in Ancient India* (Indian Press, Allahabad).

The appeal to reason pays in the long run, and in politics, more than anywhere else, it should replace the exploitation of sub-conscious, non-rational inference. The 'Federalist' is one of the classics of political science but it consists only of eighty-five articles addressed "to the people of the State of New York" and published in various New York journals by Alexander Hamilton, John Jay, and James Madison from the autumn of 1787 to the spring of 1788, when the draft of the Federal Constitution was presented for ratification. They are full of law, history and philosophy and uniformly pitched in a high key but they served the purpose better than any amount of rhetoric would have done.

Appeal to Reason.

In the present circumstances of India there are two particular reasons for a thorough exploration of political and administrative possibilities. The democratic experiment which the country is out to try will be the most gigantic of its kind in human history. The ancient Greek city-states hardly equalled an average Indian district in area; a modern European democracy roughly corresponds to an Indian province; Canada, South Africa and Australia are sparsely populated, while not even the United States of America can count more than one-third of the inhabitants of India. The colossal scale of the Indian project almost staggers the imagination. Add to its magnitude the difficulties presented by the ignorance, poverty, and sectionalism of large portions of the population and it is easy to realise that the politics of the future demand the highest intellectual effort and judgment we can offer. An historical survey of democracy or a philosophic analysis

Democracy.

of the democratic dogma lies beyond the scope of these pages but it may be premised that democracy is the most difficult of all forms of government as it makes the heaviest demands on the intelligence, alertness, discernment, integrity and public spirit of the average man and woman and on the forces which make for solidarity and steadiness in society as a whole. The moral and educative value of democracy is writ large over many pages of classical and modern history, over some of the most brilliant epochs of culture. The stir and bustle of public life, the responsibility cast upon the individual and the consequent realization of his own importance fire his nature and make him a more energetic, a more self-confident being, in private as in public affairs. Democracy endows the citizen with a new self-respect and raises his moral stature. It tends to make the individual an end unto himself, not a mere means to others, as Kant said. It throws him into the whirlpool of political discussion and gives him an incentive to acquire knowledge, to think and to judge between rival claims and arguments. It is or ought to be an education in itself. As John Stuart Mill puts it, "the only sufficient incitement to mental exertion in any but a few minds in a generation, is the prospect of some practical use to be made of its results."[1] Besides, Democracy tends to consult the experience and interests of all and thus to make for the welfare of the whole community. To quote Mill again, "one of the tests of good government consists in the degree of perfection with which it organises the moral, intellectual and active worth, already existing so as to

Advantages of Democracy.

1 Mill, *Representative Government*, 2nd ed., p. 48.

operate with the greatest effect on public affairs."[1] Democracy has the best chance of satisfying this test. It can be a government of guidance and yet avoid the debilitating effects of authoritarianism.

On the other hand, it has shown itself capable of reproducing, sometimes in an aggravated form, many of the evils which current political maxims associate with despotic monarchy and close oligarchy. Several European countries and above all the United States of America, suffer from unprincipled courtiers of Demos, untiring in their homage to the irrational prejudices and passions of large sections of the population. Everywhere over democracy seems to arise the gaunt spectre of the professional politician, whose one aim is money, office and power, who is completely free from moral scruples and who, with keen zest, organises deceit, hypocrisy and corruption. Everywhere except in Switzerland and the Scandinavian countries, the plutocrat attempts, with varying degrees of success, to buy off the voter and legislator, to control the press and the platform. The fathers of the American constitution had many misgivings on the score of the ignorance and impulsiveness of democracy, but they do not seem to have entertained any apprehensions from wealth. Yet it is here that democracy has encountered its greatest danger. In America politics has become a byword for much that is low or disgraceful in human life and character. Nor has democracy yet attained stability and permanence. As one of its most trenchant critics, Sir Henry Maine, pointed out,

The Failings of Democracy.

1 *Ibid.*, p. 33.

it did not last very long in Ancient Greece, while it has (until lately) weltered in bloodshed and anarchy in Latin America. Recent happenings not merely in Spain, now gripped by a military regime, but also in the land of Mazzini and Garibaldi, so completely dominated to-day by a dictator show that the world is not yet so safe for democracy (or democracy is not yet so safe for the world) as the optimism of the nineteenth century imagined. The root of the trouble is, as political observers in all countries complain, that the mass of voters are too apathetic, too indolent to care for power, which accordingly falls into the hands of a class of adventurers. Nor can it be denied that popular ignorance sometimes tends to make democracy, what Faguet called it, the cult of incompetence. When all is said, however, it must be admitted that given a certain amount of solidarity and integrity, the balance of advantages lies on the side of democracy and that whatever its difficulties and dangers, there is in our present situation, no alternative to it. But this renders it all the more obligatory that political students and statesmen of a nation preparing for a great venture should chart the seas and on the basis of all available knowledge, experience and skill, so construct the vessel as to enable her to weather the numerous storms that she is only too likely to encounter. If failure and disaster are to be avoided, the practical application of the democratic principle must be adjusted to the psychological traits and the social and economic environment of the Indian people and must be accompanied by such a system of checks and balances as may avert the undue predominance of a single social force and induce the concord of warring influences and elements.

The Balance.

Safeguards for Groups.

It is the existence of divergent points of view and certain apprehensions in the minds of two or three groups that constitutes the second particular reason for thinking out the details of a new scheme of Indian governance. None need be so simple-minded as to imagine that constitutional devices alone can stamp out bickerings and animosities rooted in the preponderance of group-feeling over national patriotism and in the clash of economic interests. A deeper sense of political obligation, secularisation of public life, and modernisation of social institutions are essential to an abiding solution of the various communal problems. But apart from *a priori* reasonings, the experience of the United States, Switzerland, Canada, Belgium, Czecho-Slovakia and Jugo-Slavia, conclusively proves that a carefully-planned constitution may guarantee the legitimate rights of minorities and may render it impossible for any legislative majority or executive to deal unfairly with them. Constitutional safeguards can go a long way to set their apprehensions at rest and to win their loyalty and co-operation for the common weal. Once set in motion, the centripetal forces will unconsciously but rapidly, as in America and Switzerland, complete the political cohesion and make the national spirit all-pervasive.

Basis of Discussion.

Speculation on the future constitution of India must, of course, take account of the political, social and economic situation in the country and the trend of its historical development. But it will lack breadth and perspective if it neglects the experience of other lands. There are to-day nearly two hundred legislatures at work governed by as many different constitu-

tions, which range between opposite extremes. The past generations have witnessed the operation of more than twice as many different instruments of government. On a modest estimate, the world has experimented with at least six hundred constitutions. Their provisions and the attendant conventions fall into all imaginable grades and varieties. It is difficult to-day to hit upon a brand new form of government or constitutional device, which has not been tried or suggested at some epoch or other, in some locality or other. The political scientist can now, as it were, work in a laboratory. He cannot, like the physicist or the chemist, vary the mixtures and quantities at will but he can watch the conditions and results of the experiments which are in progress or which have been adequately recorded. To every student of constitutions it is clear as de Tocqueville said, that "in matters of political framework, the field of possibilities is much more extensive than men living in their various countries are ready to imagine." A comparative study of constitutions, in their historical and social setting, may train the mind for creative thinking and furnish valuable suggestions. It is significant that a number of modern constitutions which have proved successful were framed after a careful comparison of existing instruments of government. The founders of the American constitution closely studied the British model. The great, almost decisive influence which James Madison wielded in the Philadelphia Convention was derived from his ready, accurate knowledge of ancient and modern political history. "The work of the Convention" writes Woodrow Wilson, "was a work of selection, not a work of creation, and . . . . the success of their work

Illustrations.

was not a success of invention, always most dangerous in government, but a success of judgment, of selective wisdom, of practical wisdom—the only sort of success in politics which can ever be made permanent."[1] Later, after careful study the Americans borrowed the ballot system from Australia, proportional representation from Belgium, the Initiative and the Referendum from Switzerland and Civil Service Reform from Great Britain. It is a mere truism that the European Continent borrowed profusely from England. On the eve of her peaceful constitutional revolution, Japan despatched a commission headed by Prince Ito (in March, 1882) to the west to study political institutions. The mission visited the United States, England, Germany and other European countries and produced a report which served largely as the foundation of political reform.[2] The Australians passed in review the political experience of numerous lands before they framed their Federal Constitution which came into operation in 1900. Prior to the meeting of the South African Constituent Convention at Durban in 1908, the Premier of Natal requested and obtained from the Australian Attorney-General's Department, a Memorandum on the working of Australian institutions. The Irish Constituent Convention commanded a compilation of the " Select Constitutions of the World " as the basis of discussion. Even for projects of piece-meal constitutional reform a comparative study of foreign institutions is now regarded as essential. For instance, Lord Bryce undertook the survey of Modern Democracies to provide " a solid basis

1 Wilson, *The State*, Revised Edition, p. 291.

2 Uyehava, *Political Development of Modern Japan*, pp. 87, 100; McGovern, *Modern Japan*, pp. 57, 67; also Okuma, *Fifty Years of Modern Japan*.

for argument and judgment on schemes of political reform in England."[1] Those interested in the reform of the House of Lords have felt bound to survey the Second Chambers of the whole world.[2]

General Principles.

It is also desirable that those concerned with the construction of constitutions should acquire a firm grasp of general principles. The very complexity of the facts to be dealt with, the obscurities which every situation in the modern world seems to involve, require the light of principle, which, after all, is only the largest expediency generalised. It is the fashion in some quarters to dismiss ideologues as pedantic and impracticable but, apart from the fact that men of action have not managed the world so superbly well as to disarm all criticism, it is difficult to see how an intellectual grounding and a stock of ideas can incapacitate anyone from taking a just view of public affairs, spotting the weak points and suggesting appropriate remedies. More than ever the world to-day stands in need of statesmen with vision and ideas, who can think on a large scale and not merely in terms of hourly needs, who will plan and construct on a firm, broad base and not be content with merely transient patchwork. Thanks to the accumulation of knowledge every branch of human activity is becoming, in its higher grades, a learned profession. Industry and commerce require prolonged study for their guidance. The army is now a learned profession —the last war was eminently one of chemists, engineers

1 Bryce, *Modern Democracies*, I, Preface, p. vii.

2 *Cf.* the Report of the Bryce Committee on the House of Lords; Marriott, *Second Chambers*; Temperley, *Senates and Upper Chambers*; Lees-Smith, *Second Chambers in Theory and Practice.*

and higher strategists. By a strange irony of fate, politics alone are left the world over to amateurs, to men who openly despise ideas, who rely on arts of management and who deem themselves successful and brilliant if they can just manage to live from hand to mouth. The more one studies the game of politics, past or present, the more is one convinced of the truth of the Platonic dogma that rulers must be versed in ideas.

An Historical Reason.

In any case, a country starting on a stupendous enterprise can scarcely afford to dispense with those rules of general guidance which belong to the domain of political philosophy. There is one strong historical reason why the new Indian constitution should take note of political principles and world-wide political experience. The progress of the Indian constitution, as distinct from administrative routine, has largely followed the English way with a few side-glances at Dominion practices and, some significant innovations. The rest of the world hardly entered into the calculations of those who were directly or indirectly responsible for the formulation of Indian constitutional projects. To this time-honoured practice, however, there are a few objections. In the first place, the English constitution, though first in historic origin and importance in the modern world, is the result of very slow growth extending over more than seven centuries. The traditions which it enshrines and the reverence which it has won enable its organs to function with a smoothness and harmony which can be expected nowhere else. Other nations which were summoned to a career of responsible govern-

Danger of following English Forms.

ment rather suddenly and which could, in no case, wait for centuries had to reckon without the traditions and the reverence and to plan in a somewhat different style. In the second place, the English constitution is extremely flexible and extra-legal; it does not exist, said de Tocqueville. In a great measure it is only a part of the Common Law of England. ". . . . We are proud of being an illogical people," writes Sidney Low. "So we have carefully avoided systematisation; we provide for immediate necessities; and we are content with a constitution, which has been found to meet our practical requirements, though it is partly law, and partly history, and partly ethics, and partly custom, and partly the result of the various influences which are moulding and transforming the whole structure of society, from year to year and one might almost say, from hour to hour."[1] It is obvious that an arrangement, so intensely empirical and so deeply intertwined with every fibre of the national life is suited only to the country which brought it into existence. So far as the English people are concerned, the sovereign merits of this system or rather want of system are abundantly in evidence. The elasticity has ensured the harmonious play of social and political forces, old and new; it has disarmed revolution by meeting it half-way; in our own day, it has tamed Socialism. But *prima facie* it would not be expected to function well on a different social plane, with a different psychological setting and historical background. The Anglo-Saxon inhabitants of the United States and the Dominions are heirs to the English tradition and habits of thought but they found it

1 Sidney Low, *Governance of England*, Revised edition, pp. 4-5. *Cf.* Bryce, (on Flexible and Rigid Constitutions) in *Studies in History and Jurisprudence*, I, p. 163 ff.

necessary to depart from the English model in important particulars. On the continent of Europe, which owed its political inspiration largely to England, the English government has been warmly admired but its forms have been departed from in many directions. In 1922, the Irish Constituent Assembly adopted a scheme widely different from English practices. In India where the psychological and social characteristics, the intellectual and economic conditions are even more different, the English constitutional ways are more difficult to follow. Conventions require decades to mature and win the force of laws and cannot be relied on by those who must forthwith embark on constitutional government. The Common Law, again, cannot be invoked to support the constitution in a land to which it is alien. It is essential that recourse should be had also to other constitutions and to general principles for suggestions on the Indian problem. In the third place, the problems that have confronted England are very dissimilar to those which face India at present. Her insular position, linguistic homogeneity, social solidarity and, of late, her industrial and commercial greatness have averted many of the difficulties which the new nations in Central and Eastern Europe have been struggling to surmount. The states which have succeeded to the polyglot Austro-Hungarian Empire have endeavoured, through the agency of the Organic Law, to adjust the relations not merely of the Executive, the Legislature and the Judiciary but also of majorities and minorities, of followers of different religions and speakers of different tongues. It is true that Indian conditions are different and simple imitation is out of the question but here some valuable suggestions and warnings may be gathered.

A comparative study of constitutions must look not merely to their theory but also to their practice. The former often lags behind the latter as was discovered by the successors of the first generation of American statesmen who, influenced by Montesquieu and deceived by appearances, had failed to grasp the real distribution of power in English political arrangements. Above all, it is necessary to go behind political contrivances and mark the operation of forces which move and direct the constitutional mechanisms of various states.

Social Forces.

A student of Indian constitutional problems at the present day is at a disadvantage compared with the writers who undertook to offer suggestions to the "founding fathers" in Germany, Austria, Poland, Czecho-Slovakia and elsewhere after the War. They could range freely over the whole field and promulgate root and branch projects. If they had no clean slate to write on, there was nothing which they need refrain from modifying. In India, however, three great issues of policy still remain unsettled—the exact tenour of the relation of the Indian Government with the authorities in London, the relations of the Indian States with the paramount power within India, and the political position of the minorities. These are questions primarily of negotiation and settlement rather than of constitutional drafting, demanding a different order of investigation and thinking. As such they lie beyond the scope of this pamphlet but they cannot be altogether avoided in any constitutional discussion and must be touched upon, if only in a tentative manner. But the solutions which may be finally agreed upon among the parties concerned, will necessitate corresponding modifications

Issues of Policy.

in the proposals worked out in these pages. A further limitation may be stated. Contrary to the usual practice, it is not intended here to present a constitution in the form of a Bill, a task which trained lawyers and parliamentary draftsmen alone can satisfactorily perform. From the nature of the inquiry it may sometimes be advisable to summarise one's conclusions into something like the clauses of a statute, but, for the most part, the discussion will be conducted on a non-technical basis.

CHAPTER II

THE SCOPE AND PURPOSE OF THE CONSTITUTION

Two recent American writers have defined a constitution as "a body of rules or maxims defining the scope of public authority and determining the manner of its exercise."[1] A more searching definition had already been offered by James Bryce when he wrote that "a constitution properly so called is a frame of political society organized through and by law, that is to say, one in which law established permanent institutions with recognized functions and definite rights."[2] As such it may consist not merely of legal enactments but also of conventions and understandings which help to regulate the exercise of legal powers and the day to day relations of the various organs of authority, including the electorate. Both elements are present in all constitutions, save the more primitive and rudimentary ones which may be purely customary and extremely fluid, and, strictly speaking,

Definition.

Written and Unwritten Constitutions.

1 Rogers and McBain, *New Constitutions of Europe*, p. 154.
2 Bryce, *Studies in History and Jurisprudence*, I, p. 159.

hardly deserving of the name. Constitutions of an advanced type, however, comprise laws and conventions in proportions which vary immensely. The statutory enactment of important constitutional measures in England notably in 1832, 1867, 1884-85, 1911 and 1918 and the rapid growth of political conventions in the United States, France and elsewhere have rendered the old distinction between written and unwritten constitutions one of degree rather than of kind. Nevertheless the distinction is a real one and useful to political science. It serves to indicate that while some constitutions may be predominantly statutory others may be largely customary. The framers of a new constitution must determine whether one type or the other will best suit the temperament and the social conditions of the country concerned.

Rigidity and Flexibility.

There is another classification of constitutions, suggested by James Bryce, into Flexible and Rigid. Broadly speaking, the former are those which can be altered by the ordinary legislature like ordinary statutes, while the latter require for their amendment either some extraordinary procedure on the part of the ordinary legislature, such as a joint session of the two houses or a two-thirds vote in an ordinary session or in the presence of two-thirds or more of the total membership, or the concurrent action of state legislatures, or extraordinary conventions, as in the United States. The degree of rigidity varies so widely with different constitutions that this distinction has also ceased to be one of principle. Yet it is a vital and fundamental distinction, on which the success or failure, it may be, the very existence of instruments of government may depend on critical occasions. The points to be settled

are to what extent, on a balance of all considerations, the new constitution of India should be rigid and reduced to legal enactment.

National Temperament.

The Greeks whose political experience was more direct, intense and varied than that of any other people, ancient or modern, perceived that a constitution must correspond to and in its turn must foster, the peculiar virtue of the community concerned. In modern jargon, every constitution must answer to the national temperament. Montesquieu, who, in 1748, inaugurated the modern scientific method in social inquiry put the whole matter in a nutshell when he observed that the best government is that " which agrees with the humour and disposition of the people in whose favour it is established."[1] The psychological factor in politics, neglected too long, has recently been stressed by some schools of thought in the West, notably in England, France and the United States. It is to be regretted that few attempts have been made towards a scientific investigation of national character and that the theme, even in the hands of leading psychologists like McDougall, has evoked an inordinate amount of racial prejudice and vanity. National character has become, as a singularly sane writer put it, a wonder-worker at the beck and call of every embarrassed historian, the rule of the game being to play the national character when nothing else seems to avail. Nevertheless, a comparative study of the art, literature, institutions and habits of thought and feeling points to the existence of different psychological traits amongst dif-

[1] *Spirit of Laws*, I, ch. 3.

ferent peoples. In the ultimate analysis their origin may be traced to the influence of soil, climate, economic occupations or the trend of history. For the political scientist it is enough to start with their existence and to reckon with them in his speculations. It is generally accepted that the Englishman is reserved, severely practical, endowed with a marvellous capacity for self-discipline and organization, distrustful of logic and abstractions. In several important respects, the Indian temperament is almost diametrically opposed to the English. Wedded to logic and definition, the Indian mind delights in clarity of thought and has an overpowering love of principle. It displays an imaginative fervour, an emotional flow and vibration, greater than anything to be found with the Teutonic races. As compared with the English temperament, the Indian stands nearer the Celtic and yet closer to the Slav. All traits of temperaments have the defects of their qualities. But it is useless to quarrel with them. You may as well quarrel with the winds and the waves. The facts have to be acknowledged, the forces reckoned with. Every expression of governance should accommodate itself to the psychological outlook, as to the ethical and social conceptions of the group concerned. If the Indian constitution is to receive that quick response and loyalty which are indispensable for the vitality and durability of a Government, it must conform, in tone and spirit, to the ethos of Indian mentality. It must lay down principles and not merely allow room for expediencies; it should be definite and fixed, not flexible and elastic; it should be as clear and logical as the subject-matter permits. All this no longer involves any political heterodoxy. The Irish have departed from English ways, and, in consonance with their tempera-

ment, enacted a clear-cut constitution remarkably free from ambiguity or vagueness and avoiding that confusion between theory and practice which pervades English arrangements. The Slav nations have similarly expressed their temperament through their constitutions. Unless we avoid that disharmony between the virtue of the people and the virtue of the constitution which Aristotle deplored long ago, the constitution will appear as an exotic imposition and fail to command the spontaneous allegiance and reverence which are the greatest asset to a Government. Now, the Indian temperament does not accord with an empirical, indefinite, conventional instrument of Government.

Trend of Modern History.

The written and rigid type of constitution recommended by the facts of the Indian psychology also accords with the trend of modern political history. Ancient constitutions such as those of Athens and Rome for instance, were, as a matter of practice largely unwritten and flexible. They were not sudden creations but rooted in the law and morality of the age. Hence they functioned well for long but their later working and ultimate fate point to a warning rather than an example. All through classical history the Greek constitutions, including that of the far-famed Athens, tossed to and fro on the stormy seas of oligarchic and democratic passion and were often hopelessly shipwrecked. The Roman constitution bent under Sulla and Marius and finally broke under Julius Cæsar and Augustus in the first century B.C. and in the first century A.D. It is not claimed that any constitution, howsoever rigid and well balanced, is proof against revolution. But in the annals of antiquity one does feel that enthusiasm was rarely canalised, passion was rarely

dammed. Allowed to overflow at any time, they engulfed all moral safeguards and prepared the ground for subjection. In modern times, England, Hungary and Italy are the only three noteworthy instances of unwritten and flexible constitutions. The fate that has lately befallen Italian institutions discloses the danger of giving revolution an excuse to masquerade in a constitutional guise.[1] Nor did the Hungarian constitution, remarkable and meritorious in many respects as it was, succeed in producing internal harmony or in preventing needless oppression at the hands of the dominant Magyar majority. The only flexible constitution which can be pronounced an unquestioned political success is that of England. Here, however, a good deal must be ascribed to the amazing political acumen of the English people which is the envy and admiration of the whole world. Their sturdy political sense would extract favourable results from any governmental machine. For the rest, the English constitution is largely embedded in the Common Law; it inheres in the history of affairs, concrete affairs—conditions which cannot be reproduced elsewhere; it accords with the peculiar English mentality different from that of most other peoples. Nor should it be forgotten that the English constitution, while as flexible as ever in spite of opposite views advocated by notable writers like Sir Henry Maine, now comprises a good many statutory enactments.

1 It is significant that Napoleon Bonaparte, the greatest autocrat of modern times, expressed his preference for "a short and obscure constitution" which, he perceived, could easily be made to subserve the ends of ambition.

In the course of his penetrating studies on constitutions, Bryce remarks that written constitutions are better adapted to the needs of democracy. They can be understood by all, while only a comparatively small number can hope to understand the complexities of a customary constitution or work it. "For such comprehension there is needed not only some knowledge of history but close and continuous observation of the machinery in motion, and either participation in the business of governing or association with those who are carrying on that business. The mass of the nation cannot be expected to possess this familiarity."[1] Unwritten constitutions can well be worked by oligarchies such as the one which, to all intents and purposes, governed England until recently. Democracies require written and rigid instruments of government. A written constitution is better calculated to win the affection of the people because it appears to them "as the immediate outcome of their power, the visible image of their sovereignty."[2] Flexible constitutions have one undoubted advantage. To quote Bryce again, they "can be stretched or bent so as to meet emergencies, without breaking their frame-work; and when the emergency has passed, they slip back into their old form, like a tree whose outer branches have been pulled on one side to let a vehicle pass."[3] But this presupposes a unitary form of government and a general agreement on all fundamentals. Besides, it is a two-edged sword which may cut either way. To continue Bryce's metaphor, the stretching may be too violent or

Democracy.

1 Bryce, *Studies in History and Jurisprudence*, Vol. I, p. 187.
2 *Ibid.*, I, p. 200.
3 *Ibid.*, I, p. 168.

too frequent and the branches may fall asunder. That valued conventions, unsupported by the force of law, may be sometimes endangered is proved by numerous incidents even in countries where the constitution is for the most part written. In the United States, the example of Washington, Jefferson, Madison and others established the convention that a President should not be re-elected more than once. But Grant and Roosevelt, heroes of the nation, sought to break the unwritten rule. They failed but there is no guarantee that a more successful attempt is impossible. The practice of relying on conventions to determine the relations of the Governors and Ministries in the Dominions has been productive of endless friction and, as late as 1926, produced a constitutional crisis in Canada. Every living constitution must of course produce conventions and understandings to meet the ever-changing needs of a progressive community but subject to that reservation, the modern world, as a whole, has declared for the written type. It now obtains in the British Dominions, the United States and Latin America, the European Continent as a whole, and Japan.

Other uses of a Constitution.

Besides providing for organs of government, their sphere of authority, the mode of exercising that authority, and their mutual relations, such a constitution has been utilised to serve some other purposes. Not merely has it facilitated federation and therefore unified government for certain essential purposes in many lands but it has furnished guarantees to the individual for his free self-expression and to minorities for their political, cultural and economic interests. It has been used to impress and impose on legislatures and execu-

tives the performance of some necessary economic and educational services. It will be observed that the scope and purpose of the constitution have widened far beyond the limits which the term suggests. A constitution now often contains much that is extra-constitutional, much that is broadly political, economic, cultural and ethical. It is becoming the quintessence of the general fundamental law of society of which the political law is only a part. To-day, law is not, as in Greece and Rome, simply the will of the organised community; it is also a restraint on the will of the organised community.

Federation.

Besides the general political and psychological reasons adduced above, there are several paramount considerations which, in India, call for a rigid, detailed constitution of wide scope and purpose. In the first place, the vast area and population of the country clearly mark it out for a federal, as opposed to a unitary, type of government. The character of Indian federalism will be discussed in a subsequent chapter,[1] but several governing conditions may be pointed out here. In the first place, real provincial autonomy implies independence of action within certain spheres. Once the spheres have been defined, neither the national executive nor the national legislature should be allowed to encroach on the provinces. *Pari passu* the latter should never be allowed to travel beyond those limits. It is, therefore, necessary to determine the spheres of powers to be allotted to the federal and provincial governments and to incorporate the settlement in the fundamental law, beyond the reach of the executives or legislatures on

[1] *Supra*, Ch. IV.

either side. It is obvious that a written and rigid constitution alone will give a chance of autonomy to the provinces which, so far, have been dominated by the Central Government.

In the second place, no Indian constitution can be adequate which does not open a door for the admission of Indian States. In spite of evident diversities, India is one geographical whole which has no room for two divergent political systems. All through Indian history is observable the attempt to bring the whole country under one hegemony and the sway of one political principle. In the absence of the modern facilities of communications the attempt could not be permanently successful, but the Mauryas in the fourth and third centuries B.C., the Andhras in the second and third centuries A.D., the Guptas in the fifth century, the Vardhanas in the seventh, Gurjara-Pratiharas in the tenth, the Khiljis and Tughlaqs in the 14th and 15th, the Mughals in the 17th, the Marathas in the eighteenth and finally the British East India Company in the 19th century succeeded in imposing their suzerainty over nearly the whole country. The last effort has turned out more thorough and durable than the previous ones because its results could be effectively consolidated by the railway and the telegraph.

Indian States.

In all cases a good deal of local autonomy was allowed in various parts of the country but the overlordship of one power in the country had to be acknowledged by all. In the last resort there was one common sovereign for the whole country. The law of political gravitation drew all units round a single centre. The age-long tendency towards union (not necessarily unity) has been enormously strengthened and intensi-

fied by the applications of science and the firm hand of the Government of India. The hard unalterable facts of geography and history and the forces of science have determined that the country should have one political system. All through the ages the principles of governance in various parts of India have tended to approximate to one common standard.[1] Until a generation ago, the basic principle of governance in British India, efficiency and enlightenment apart, was not very different from that which ruled the Indian States. Recent changes here have already induced changes in the States. The inauguration of federalism and democracy in British India will, as by a law of nature, have tremendous repercussions on the States, which, besides, have been opened up to the direct operation of all the modern influences. If the administration of the States moves in the same direction, it will have to be fitted into the general framework. For that probability the new Indian constitution must make allowance. But, whatever the form of administration in the States, they stand in certain intimate relations with the Government of India and the constitution which has to govern the latter, must allow for changes which the force of events may induce in those relations. Now, the States cannot, and should not, be expected to part with the autonomy, which they enjoy under treaties, engagements and sanads. They must be adjusted into the general system so as to guarantee to them the amount of independence they already enjoy. This end can be achieved, as it was achieved in somewhat analogous circumstances in pre-war Germany, by

1 For a full development of the argument see my *State in Ancient India en passant*.

a federation resting on treaties and a rigid and written constitution. In such a contingency, treaties will be deemed part of the constitution, as the Treaty of Versailles is part of the present German Constitution, or the Treaty with Great Britain is part of the Constitution of the Irish Free State. Within the terms and implications of the Treaties, the states may form part of the general system which, under the circumstances, can only be a federation. It is evident that this federation must have a rigid and detailed constitution to guarantee the rights of the States and to prevent the various organs of national or provincial governments from violating them.

The Executive and the Legislature.

In the present Indian situation, a powerful argument for a written constitution is furnished by the suspicions which have arisen between the executive on the one hand and the legislatures or public opinion on the other. It is needless here to investigate the causes of this mutual distrust or to fix the responsibility for it. The *fact* of the distrust is there and must be reckoned with. It is clear that it must be removed before responsible government can properly function and before legislatures and executives can be expected to refrain from encroaching on each other's prerogative. The only lasting solution of the difficulty, apart from making the executive responsible to the legislature, is to fix the location of certain powers beyond all doubt. The constitution should define as precisely as possible the relations of one with the other. This was one of the reasons which led the New England Colonies, mortally afraid even after Independence, of the Executive as personified in George III, to frame a written constitution.

In the light of modern world experience it is not only the Executive but also the Legislature, even when elected on the widest suffrage, that requires regulation and restriction. In the first half of the 19th century, Europe, sick of despotic executives, imagined that if only they could be made responsible to broad-based legislatures the millennium would be ushered. James Mill[1] expected the representative system to be the "solution of all the difficulties, both speculative and practical." John Stuart Mill, extolled Representative Government as the perfection of the political art.[2] On the Continent, the faith was pathetic. But when the reform had been effected, a generation sufficed to disillusion the prophets. The legislatures in Europe, and particularly in America did not turn out to be the repositories of pure virtue and perfect knowledge but revealed many of the deplorable weaknesses to which frail humanity is subject. Many legislators fell into the clutches of the Machine—politician who raised wire-pulling and log-rolling to a science and a fine art. Only too many representatives fell victims to the subtle forms of bribery—office, allowance, pensions. Thanks to popular apathy, the money power has corrupted numerous Senators and Delegates in the States of the American Union and not even the Federal Houses have escaped the contagion. Besides the sins of commission, there have been almost equally grave sins of omission. While time was wasted in rambling speeches, and money in questionable undertakings, some essential reforms were neglected and many social projects forgotten. Members revelled

Restraint of the Legislature.

1 James Mill, *Essay on Government*, see pp. 16—18.

2 Stuart Mill, *Representative Government*.

in " playing " politics, in excitement for its own sake. Party whips have been described as " stage-managers of companies who unite in enacting the parliamentary play." In the United States many legislatures are despised and the close of their sessions hailed with relief. In France, politicians have become discredited, " partly by the accusations they bring against one another, partly by the knowledge of places to individuals and favours to localities in which deputies act as intermediaries between Ministers and local wire-pullers, while scandals occurring from time to time have, although few deputies have been tarnished, lowered the respect felt for the Chamber as a whole "[1] The Panama scandal is still used as a reproach against parliamentary government in France. Not long ago, a number of Japanese legislators were arrested for complicity in a banking scandal. It has been noted that the standards of tone, manners and intellectual attainment have declined in Canada, Australia and New Zealand.[2] Even the English House of Commons, unsurpassed in dignity, purity and talent, no longer commands the esteem which it once did.[3] Pure representative government is to-day an object of almost universal distrust. Political philosophers denounce it outright or seek to introduce changes which would deeply modify its basic principle. Public opinion has fallen into line with the later trend of thought, deprived the legislatures of omnipotence and partially regulated the exercise of their powers. Constitutions, which they are incapable of altering, lay down that under no circumstances are they to pass measures of a certain character and that they must devote them-

1 Bryce, *Modern Democracies*, II, p. 369; I, p. 338.
2 *Ibid.*, II, p. 370.
3 *Op. cit.*

selves to the performance of certain imperative duties. For instance, *ex-post-facto* laws, bills of attainder, etc., may be categorically prohibited while popular education, labour welfare, etc., may be described as claiming the first attention. It may be admitted that the ultimate remedy for the diseases of governmental organs lies in the operation of public opinion, alert, instructed, suffused with moral fervour and free from sectionalism. But the experience of all ages and countries proves that this force is not always easy to rouse and institutional means must be summoned to aid. In Switzerland, the States of the American Union and in the new States of Europe, a good deal of power has been transferred from legislatures to the people for direct exercise—a movement which strikes at the root of representative government and tends to reproduce, *mutatis mutandis* in the altered geographical circumstances, the features of the direct democracy of classical history. Modern statesmanship has reverted to the ideal of Rousseau who declared sovereignty to be inalienable and unrepresentable. Thus, proposals for constitutional amendment and other important measures may be referred to the people and directly voted upon. Or the people may themselves originate measures and even present draft statutes for voting. But the Referendum and the Initiative, as these devices are called, will not, for a long time to come, admit of application to India where the electorate is new to its task. Besides, even in Switzerland they occasionally prove irksome. "Our frequent votings," they say, "tire the peasant and the workman. He cannot, even have his Sunday for recreation."[1] When

[1] Bryce, *Modern Democracies*, I, p. 465.

a penalty for abstention from voting was introduced, the bewildered folk voted blanks in large numbers. Nor have happier results ensued in Belgium where the penalty ranges from a reprimand to a fine. The Referendum or the Initiative can at best suit only a small country and its application presents serious difficulties in an extensive area. The Bryce Committee on the House of Lords concluded that it was not suitable to England.[1] Much less could it be appropriate to Indian conditions. We can only fall back on the other set of remedies which consist in framing a comprehensive fundamental law to keep the executives and legislatures to their proper place and functions. The new constitutions variously contain principles, suggestions or hints on agrarian reform, nationalisation, coal mines under state management, bread-subsidies and relief of unemployment, education, etc., etc.

Another reason for a written rigid constitution is to be found in the necessity of protecting personality from undue encroachment on the part of the Government as such. No civilized Government, much less a constitutional Government, will habitually be arbitrary and be needlessly harsh to individuals. But in a panic every Government is liable to succumb to the temptation of getting round inconvenient persons and giving a short shrift to their activities. It is here that lies the danger to what may for convenience be called the rights of individuals. One need not believe in the old individualistic dogma of self-regarding and other-regarding acts and putting the former out of the reach of organized social authority, nor need one entertain Herbert Spencer's horror of State interference, to hold

[1] *Report*, para. 55.

that Government, despotic or responsible, must be prevented from treating lightly the individual's religion, culture, freedom of thought, movement and association. In England, the common law guarantees the liberty of the press, the right to public meeting and association and sets limits to martial law. The United States recognises the common law but has also used the Constitution for guaranteeing some of the most important rights of the individual. In the vast majority of other self-governing countries, the constitutions categorically enumerate and guarantee the essential rights and privileges. In India the position of the common law is rather vague and uncertain. We must, therefore, resort to the Constitution and, while making provision for grave crises as they have done in Germany and elsewhere, make the maintenance of Rights normally binding on the Executive, the Legislature and the Judiciary alike. Even in the case of dire emergencies it can, for instance, be laid down that the Executive should never act alone but always with the consent of the Legislature, or during adjournments, of a recess committee of the Legislature. In all circumstances the place of the judiciary in the political framework should be beyond doubt and *pari passu* the conditions and limits of martial law prescribed.

Minorities.

Lastly, a rigid constitution is essential to guarantee the rights of minorities and to set at rest any apprehensions they may entertain from the majority in any province or in the country as a whole. It is needless to inquire here into the causes of the suspicions and antipathies which have marked the relations of two or three communities in the country in recent years. The tension has to be accepted as a fact and an effort made to

remove all legitimate grievances on whatever side and to furnish as complete assurances of fair play as possible. The experience of the pre-war German and Austro-Hungarian Empires shows that here the danger is as likely to come from the Executive as from the Legislature. Both must, therefore, be bound by fundamental laws which they cannot alter, to which all their statutes, ordinances or actions must conform and any departure from which shall be stopped or punished by the Courts. The guarantees of individual rights shall, as a matter of course, apply to all members of minority groups and protect them like all others. But something more may be done. It may be prescribed that no legislative statutes or executive decree shall, under any circumstances, discriminate between any classes of citizens. The political settlement that may be agreed upon between the majorities and the minorities may be incorporated in the constitution and may be declared liable to any alteration only with the consent, duly ascertained, of *all* the parties concerned. Similarly, the constitution may incorporate such fundamental rules on the recruitment of the public services as will ensure a square deal to all citizens, irrespective of caste or creed, colour or race. Under such guarantees, a legislature, even when dominated by one section, would be powerless to injure the vital interests of others.

The extent of Legal Enactment.

On these grounds the new Indian constitution must needs go into details and enshrine a number of principles and settlements as part of the fundamental law binding on all governmental institutions, federal or provincial, legislative, executive and judicial. In general, too, it may be argued that a departure from

established political practice, a new form of government, should be embodied in a constitution for the sake of fixity and stability. It is true that in principle any constitution embodied in an Act of the British Parliament will be a written and rigid one and that even the present constitution shares that character. But the point at issue relates to the extent of its written character. The Government of India Act of 1919, for instance, leaves many important matters to conventions and goodwill on all sides. Herein lay, from the constitutional point of view, one of its chief drawbacks, which is largely, though not entirely, responsible for the admitted failure of Diarchy. If the horizon of the framers of the scheme had not been bound by England and the Dominions, if they had endeavoured to study and profit by the other constitutional projects which were on the anvil at the same time, they would scarcely have left the relations of the Governor and Ministers, of the Executive and the Legislature to be determined by British conventions.[1] They might have perceived that conventions are not established in a day. In any case the political troubles which happened to synchronise with the inauguration of the Montagu-Chelmsford Reforms did not facilitate the growth of conventions on which everything was made to hinge. The result has been a series of ministerial crises and constant friction. At the same time the absence of constitutional guarantees for minorities at a moment when a certain amount of power seemed to be falling into popular hands has given a deep tinge of communalism to all Indian politics. The experience of the last eight years

1 The Cabinet is unknown to English law and the British North America Act. The Commonwealth of Australia Act refers to the Queen's Ministers but ignores their responsibility to Parliament.

in India, apart from the experience of other lands and general political principles, has demonstrated the need of a detailed comprehensive constitution. It may be pointed out that the difference between the English practice and the present proposal is one of method rather than of intent. Dicey points out that conventions exist for the sake of securing obedience to the deliberately expressed will of the House of Commons and ultimately, to the will of the nation.[1] But this end can be achieved in India only by investing British conventions with the force of law from the start.

Amendment.

In the whirl of modern life nothing can be absolutely proof against change; a constitution which cannot be amended at all is liable to break. Even the most rigid American instrument has been expressly or tacitly altered in several particulars. But the process of amendment should not, situated as we are, be too easy. The problem is to harmonise the elements of durability and adaptability. The subject will be discussed in a later chapter but it may be here pointed out that the process of amendment should consist of several stages so as to give time to think and ward off all possibility of hasty impulsive action, that the legislature which may originate proposals of amendment should not be authorised to pass them but that the people should have a chance of expressing their opinion in an election, and lastly, that the clauses guaranteeing the rights of minorities should not be capable of amendment except with the consent of the majority opinion of the minority as well as the consent of the majority as a whole. Some such provision is absolutely

1 Dicey, *Law of the Constitution*, 8th edition, pp. 360, 384.

essential to complete the scheme of safeguards and assurances for the interests of minorities. For this proposal which at first may appear strange the constitution of the United States furnishes a precedent. Equal representation of all states, the largest and the smallest, in the Senate of the American Union was the chief concession which won over the smaller New England colonies to the Federation. In their interest a clause was inserted in the constitution that no state should be deprived of its equal representation in the Senate, without its own consent. The theory is that the people, when they establish a constitution, not merely bind their agents in their day-to-day actions but also bind themselves to change the fundamental law only by a certain formal deliberate and stipulated process.

Conclusion.

Of the effect of a written constitution in general Bryce has said that "the nation feels a sense of repose in the settled and permanent form which it has given to its government. It is not alarmed by the struggles of party in the legislature, because aware that that body cannot disturb the fundamental institutions."[1] On none will this confidence act with such magical effect as on minorities. In normal political life, a written constitution will prove a steadying influence, because howsoever democratic, it tends to foster healthy conservatism. Its pervading legalism, specially when joined to the supremacy of the courts, encourages a legal cast of mind, and restrains the popular temper from rash impulsive

1 In his classic exposition of the Law of the (English) Constitution, Dicey (8th edition, 435 ff.) argued that the conventions are ultimately enforceable by the Courts. On this principle, countries differently situated should have a written constitution enforceable by the Courts.

action. It compels thought before change and allows time for passions to cool. Such an atmosphere adds to the sense of security in all minds and favours the growth of social solidarity.

CHAPTER III

RIGHTS AND DUTIES

The doctrine of Natural Rights has had a long and eventful history in Europe. Its ultimate origin is to be traced to the idea of Natural Law—supreme law, supreme reason, reason inherent in nature, as it was variously termed—which, first enunciated by the Greek Stoics before the Christian era, was adopted by the Roman jurisconsults and survived into the Middle Ages as a moral check on authority. The precise conceptions of Natural Law varied from age to age and philosopher to philosopher, but it was generally agreed that there existed a law of God or nature which, far from deriving its validity from any human power or code, rather gave the latter whatever validity it possessed. All law and government should conform to it. Kings and judges must obey it. St. Thomas Aquinas, one of the greatest of medieval schoolmen, said that the natural right did not derive its force from the written law, nor could the latter diminish or annul its force, "because neither can man's will change nature. Hence if the written law contains anything contrary to the natural right, it is unjust and has no binding force."

Natural Law.

The dogma bears some resemblance to the ancient Indian conception of Dharma, which, originating in the Vedas and developing in the Upanishads, received universal acceptance and eulogy in the Epics, the Dharma Sutras, the Dharma Shastras, the Puranas, the Niti Shastras, the Jaina and Buddhistic literatures as well as in classical Sanskrit and Pali works. Dharma was binding on all and must be respected by all, howsoever mighty and exalted.[1] It is remarkable that in former times neither India nor Europe released the state from moral restraints.

Dharma.

It was only the modern European state, which rising on the ruins of feudalism and bent on establishing order above all else, claimed to be a law unto itself and repudiated all ideas of natural law. Early in the sixteenth century the Italian Machiavelli, wayward child of the Renaissance, liberated the 'Prince' from all ethical restraints and preached the supreme gospel of 'reason of state.' Close on the Civil War in England, in the seventeenth century Hobbes built up a philosophy of downright absolutism on the basis of a contractual surrender of all power and personality to the Ruler—the monster Leviathan—and sought to make a clean sweep of the rights or pretensions of churches, corporations or individuals. But in spite of statesmen and their philosophic supporters the doctrine of natural law and of the rights which might be derived from it persisted in theory. The need of some check on authority was imperative. It was

Modern Tendencies.

1 For a detailed exposition see my *Theory of Government in Ancient India.*

held that there were affairs in which the state must either refrain from action or act on given principles. The deductions from the omnipotence of the state formed the store of Rights—Natural Rights of Man or the rights of groups. Rights were fired with a new life from the burning pages of Rousseau, though the author of the 'Social Contract' himself shared the temper of Hobbes and extolled the People as all-sovereign.

So from the close of 18th century onwards every reaction against governmental authority, every endeavour to modify it in a democratic direction, sought to base itself in theory, partly at any rate, on the validity of natural rights—rights which were inherent in individuality and which must be secured in practice and respected by authority. The Declarations of Rights issued by the leaders of the American and French Revolutions represented the dominant political temper of the times. On the other hand, those who stood for strong government in England or on the Continent, exalted the might of the State and ridiculed Natural Rights as nonsense, 'rhetorical nonsense,' 'nonsense upon stilts,' as Bentham put it. Here is no need to enter into the merits of the philosophical arguments which were adduced and are still adduced on either side. But it may be pointed out that though the antithesis between man and state is false and though it is patent that society pours itself into the being of the individual from the moment of his birth, all experience proves that society cannot gain strength and variety unless the individual is given the best and fullest opportunities for complete self-development. Accordingly, the present age has witnessed, both in theory and practice, a strong movement in the direction of curbing the power of the state. On the one side the great French

jurist M. Duguit and others have sought to demolish Austinian jurisprudence, with its concentration of all authority in a determinate Sovereign and have upheld the almost co-ordinate rights and privileges of groups, corporations or associations and therewith of individuals who compose them. On the other side the inadequacy of the state to satisfy all the cravings and aspirations of man in society, the imperative need of other forms of association to arise and render some essential services, the dangers lurking in unrestricted, though democratic, centralization to development and self-expression of personality have led to some reorganization of institutions. In the first place, a good deal of decentralization is taking place all round. In the second place, associations of diverse characters have successfully asserted their right to exist, to bargain and to manage certain affairs. In the third place, the government has, in many countries, been prohibited with varying degrees of success from violating certain 'rights' of individuals—rights necessary to create those conditions in which the individual can best pursue his quest of a good and happy life. Of all these practical movements, the numerous constitutions bear the clearest traces. In many cases specific or residuary powers are assigned to provincial or local authorities, the right of association, subject to fairplay towards others is generally recognized, and a Declaration of Rights forms an integral part of some old and all the new constitutions. It need hardly be pointed out that this whole problem of self-realisation is more than constitutional; it touches the inner springs of human life and the foundations of the social order. The ultimate solution lies in the right ordering of loyalties and the right ordering of social and economic institutions. But the constitution as the

fundamental law of the state has to hold the balance, to secure fair treatment to all, to consolidate the undoubted moral gains and to open up avenues of further progress. In the hands of some eminent jurists, the whole conception of public law has widened. In his book on "Law in the Modern State" Duguit remarks, "Public law is no longer a mass of rules which applied by a sovereign person with the right to command, determine its relations between the individuals and groups on a given territory as sovereign dealing with its subjects. The modern theory of the State envisages a mass of rules which govern the organisation of public utilities and assure their regular and uninterrupted function."[1] Again, "Law is no longer the command of a sovereign will but the totality of measures taken in a general way to secure the continuity of a public service."[2]

Historical and social differences naturally prescribe that the statements of the fundamental public law, in spite of broad similarities, should take diverse forms in various lands. Each country has its special problems of minorities, of education, of justice, of economic adjustments. The constitutions generally give together the declaration of rights proper and the provisions for solving the specific problems. Before formulating corresponding schemes for incorporation in the Indian constitution, it is advisable to pass in review the declarations of rights in some existing constitutions.

1 Duguit, *Law in the Modern State*, tr. Harold and Freda Laski, pp. 48-9.

2 *Ibid.*

Belgium.

The Belgian Constitution, promulgated on the 7th of February, 1831 and amended in 1893 and 1921, states the rights of Belgian citizens (*vide* Title II, Art. 4—24), of which the chief may be noted. There shall be no distinction of classes in the state. All Belgians are equal before the law; they alone are admissible to civil and military offices, with such exceptions as may be established by law for particular purposes (Art. 6). Individual liberty is guaranteed. No one may be prosecuted except in cases provided for by law and in the form therein prescribed (Art. 7). Religious liberty as the freedom of public worship, as well as free expression of opinion in all matters are guaranteed with the reservation of power to suppress offences committed in the use of these liberties (Art. 14). The press is free. No censorship shall ever be established; no security shall be exacted of writers, publishers or printers (Art. 18). The right of public meeting is allowed to all Belgians (Art. 19). They have also the right of association which shall not be restricted by any preventive measure (Art. 20). The privacy of correspondence is inviolable (Art. 22).

The United States.

The Constitution of the United States, along with the first ten Amendments, prohibits the enactment of *ex post facto* laws, or bills of attainder, suspension of Writ of Habeas Corpus, abridgment of freedom of speech, of religion, of press, of public meeting or of bearing arms, the imposition of a religious test for any office, or commercial preference to one state over another. It practically guarantees the right to be protected in life, liberty or property, unless deprived thereof by due process of law. All the state constitutions in the Union stand for full freedom of religious

opinion and worship, equality of all religious denominations and their members before the law, freedom of speech and writing. Most of them guarantee freedom of public meeting and petition and declare that "all men have a natural, inherent and inalienable right to enjoy and defend life and liberty and the natural right to pursue happiness." The billeting of soldiers except in time of war, searches and seizures without probable cause and due warrant and similar encroachments are prohibited. Many constitutions enter into minute details in railways, banking, corporations, etc., and direct the establishment and management of schools, universities, reformatories, asylums for the aged or disabled, and charitable institutions. Prison-reform and protection of children figure in numerous constitutions. It will require a volume to enumerate all the constitutional guarantees and regulations.

Switzerland.

The Swiss Constitution, likewise, guarantees equality before the law (Art. 4); freedom of conscience and belief (Art. 49); free exercise of religious worship within the limits compatible with public order and good morals (Art. 50); and the rights of petition and association (Art. 56-57). Article 50 also provides that constests in public and private law, which may arise out of the formation or division of religious bodies, may be brought by appeal before the competent federal authorities, *i.e.*, before the Federal Court.

Germany.

The German Constitution (*vide* Chapter II) contains a full statement of fundamental rights, typical of new constitutions. All Germans are equal before the law. Men and women have, in principle, the same civil rights and duties (§109). The acquisition and loss of citizen-

ship are to be regulated by national law. Every citizen of every state is a citizen of the Reich (the German Republic). All Germans shall enjoy freedom of movement, throughout the whole Reich. Everyone shall have the right to sojourn and settle in any place he pleases, to acquire property, and to carry on any gainful occupation. No restrictions can be imposed except by national laws (§110-11). Article §113 guarantees without any qualification liberty of using one's language. "Liberty of the person is inviolable. A restriction upon, or deprivation of, personal liberty may not be imposed by public authority except by law. Persons who have been deprived of their liberty must be informed no later than the following day by what authority and upon what grounds, the deprivation of liberty was ordered. Without delay they shall have the opportunity to lodge objections against such deprivation of liberty" (§114). The dwelling of every German is his sanctuary and is inviolable. Exceptions may be imposed only by authority of law (§115). Secrecy of postal, telegraphic and telephonic communications is inviolable. Exceptions may be permitted only by a national law (§117). Every German has the right within the limits of the general laws, to express his opinion orally, in writing, in print, pictorially or in any other way (§118). All Germans have the right to assemble peaceably and unarmed without notice or special permission. By national law notice may be required for meetings in the open air, and they may be prohibited in case of immediate danger to the public safety (§123). All Germans have the right to form societies or associations for purposes not prohibited by the Criminal Code. This right may not be limited by preventive regulations. The same provision applies to religious societies and asso-

ciations. Every association has the right to incorporate according to the provisions of the Civil Code. Such right may not be denied to an association on the ground that its purpose is political, social or religious (§124). Freedom and secrecy of voting is guaranteed. Details are to be prescribed by the election laws (§125). It is the duty of every German, in accordance with the laws, to accept honorary office (§132). All inhabitants of the Reich, shall enjoy complete liberty of belief and conscience. The peaceful exercise of religious worship shall be guaranteed by the constitution, and is under the protection of the state. General legislation shall not be effected by this provision (§135). Civil and political rights and duties shall be neither conditioned upon nor restricted by the exercise of religious freedom (§136). There is no state church. Freedom of assembly in religious association is guaranteed (§137). Compulsory education shall be universal (§145).

Rights of Minorities in the Peace Treaties.

In the nineteenth century, the Peace Treaties to which the great and lesser European powers were parties were used to guarantee certain rights of minorities and to impose corresponding limitations on the sovereignty of states. In 1814 the Congress of Vienna, which re-drew the map of Europe after the Napoleonic wars adopted "Eight Articles" which *inter alia* laid down that in the United Netherlands, "there shall be no change in the articles of the Fundamental Law which assure to all religious cults equal protection and privileges, and guarantee the admissibility of all citizens, whatever be their religious creed, to public offices and dignities (Art. 2). . . . . All the inhabitants of the Netherlands thus

having equal constitutional rights, they shall have equal claim to all commercial and other rights of which their circumstances allow without any hindrance or obstruction being imposed on any to the profit of others " (Art. 4). The emergence of new states from the Turkish Empire in the succeeding decades raised serious minority problems and led to the incorporation of guarantees of religious rights, of equality before the law, and of equal political privileges, in the Protocol, signed by Great Britain, France and Russia which established the kingdom of Greece in 1830, the Protocol of 1856, which established the principalities of Moldavia and Wallachia; and the Treaty of 1878, which re-organised Roumania.[1]

Due mainly to this impetus a few states elected to pass statutes guaranteeing various rights to minorities. For instance, as early as December 1, 1868, the Law of Nationalities passed by the Hungarian Parliament recognised the use of the mother-tongue in the case of all nationalities in schools, churches, and courts. But the law, which in the flexible Hungarian Constitution could not be superior to any ordinary statute was enforced only partially. After 1918, those responsible for the Peace-Treaties felt again that if the tranquillity of Europe was to be assured, the rights of minorities should be incorporated in some of the Treaties and thus placed not merely above the legislatures or executives of states but also above their constitutions. Nothing else could secure even working harmony and concord in Eastern Europe. So the recent treaties also guarantee civil, religious, linguistic, and educational rights and pre-

1 See also Article III of the Treaty which transferred Thessaly from Turkey to Greece.

scribe equality before the law. The principal treaties are supplemented by Special Conventions, such as the one concluded between Germany and Poland on May 15, 1922, relating to Upper Silesia (Part III, secs. 73—158), and by declarations made by various nations on entering the League of Nations. Identical in all essentials, such guarantees, backed by some international sanction, obtain in Poland, Hungary, Czecho-Slovakia, Jugo-Slavia, Roumania, Bulgaria, Greece, Turkey, Albania, Finland, Esthonia, Latvia, Lithuania and elsewhere.[1] As an illustration, Articles 8 and 9 of the Treaty of St. Germain (September 20, 1919) between the Allied and the Associated Powers and Czecho-Slovakia stipulate that Czecho-Slovak subjects belonging to racial minorities are to be granted the liberty of founding, managing, and governing schools and other institutions, that the Czecho-Slovak government is to grant all its subjects, whatever may be their mother-tongues, adequate educational facilities, and that the children of such subjects are to be granted the right of instruction in their native languages when they form a considerable fraction of the total number of the inhabitants of a town or district. Faithful to the international agreement, the Czecho-Slovak Constitution guarantees liberty of conscience and creed (§121), religious, social and linguistic liberty to all (§§130—32), equal civil and political rights and equality before the law to all (§128), equality of all religious

Czecho-Slovakia.

1 For some good illustrations see *The Treaty of Sevres*, August 10, 1920 (with Greece), Chapter I, Articles 1—16; *Treaty of Trianon*, June 4, 1920 (with Hungary), Part III, Section VI, Articles 54—60; *Treaty of Lausanne*, July 29, 1923 (with Turkey), Part I, Section III, Articles 37—45.

confessions before the law (§124), though it is allowed that the performance of specific religious rites may be prohibited if they conflict with public order or public morals (§125). Another article [§116(i)] guarantees the inviolability of matter entrusted to the mail. Even before the actual foundation of the Republic, the proclamation issued at Paris on October 18, 1918, by the Czecho-Slovak National Council, under the leadership of Masaryk, Benes and Stefanik had declared that " the right of the minority shall be safeguarded by proportional representation. National minorities shall enjoy equal rights." The Law of the 29th of February, 1920, deals with linguistic rights and goes into minute details, guaranteeing to minorities the right to use their languages not merely in schools but also in political, financial, postal and other services in any district where they form one-fifth or more of the population.

Austria.

By virtue of Article 69 of the Peace-Treaty signed at St. Germain-en-Laye on September 10, 1919, Austria agreed that stipulations " so far as they affect persons belonging to racial, religious or linguistic minorities constitute obligations of international concern, and shall be placed under the guarantee of the League of Nations. They shall not be modified without the assent of the majority of the Council of the League of Nations."

The stipulations concern full and complete protection of life and liberty to all inhabitants of Austria, without distinction of birth, nationality, language, race or religion. All inhabitants of Austria shall be entitled

For typical declarations before the League of Nations, see those by Albania, October 20, 1921, Articles 1—7; by Latvia, July 7, 1923. For a typical Convention, see the *Treaty between Poland and the City of Danzig*, November 9, 1920, Chapter V, Articles 33 ff.

to the free exercise, whether public or private, of any creed, religion or belief, whose practices are not inconsistent with public order or with public morals (Article 63). "All Austrian nationals shall be equal before the law, and shall enjoy the same civil and political rights without distinction as to race, language or religion. Differences of religion, creed or confession shall not prejudice any Austrian national in matters relating to the enjoyment of civil or political rights, as for instance admission to public employments, functions and honours, or the exercise of professions and industries. No restriction shall be imposed on the free use by any Austrian national of any language in private intercourse, in commerce, in religion, in the press or in publications of any kind, or at public meetings. . . ." (§66). "Austrian nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Austrian nationals. In particular they shall have an equal right to establish, manage and control at their own expense charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein" (§67). These and other rights (§§64, 65, 68) were to be recognised as fundamental laws; "no law, regulation or official action shall conflict or interfere with these stipulations, nor shall any law, regulation or official action prevail over them" (§62). All this forms part of the international agreement (Treaty, Part III, Section V).

Besides this international sanction, the Minorities in Austria have also the protection of the constitution which stands above the ordinary organs of government. Like so many other new constitutions, the Austrian

makes a clean sweep of privileges and places all on a footing of equality. Thus, Article 7 declares all Austrian citizens equal before the law. "Privileges based upon birth, sex, rank, class or religious belief are abolished." Other articles follow the general practice.

Jugo-Slavia.

The old Serbian Constitution of 1888, ratified by the Grand Skupshtina in 1889 contained the usual declaration of guarantees. Its successor, the Jugo-Slav Constitution (Sec. II, Arts. 4—21) gives a long list of Fundamental Rights and Duties. A later article (§127) however declares that "in the event of war or general mobilization, the National Assembly may for the whole of the national territory, or in the case of armed insurrection for the insurgent district, enact temporary emergency laws, abrogating the following rights of citizens: The right of assembly; free speech; liberty of movement; immunity of domicile; correspondence and telegraphic communication. In the same manner the freedom of the press may be abridged in case of armed insurrection in the district so affected." Article 16 guarantees that education shall be given by the government without entrance fees, tuition or other fees. The third section of the Jugo-Slav Constitution contains social and economic regulations and indulges in long precepts, principles and hypothetical projects. A few clauses may be quoted as guaranteeing just treatment in certain cases. "Invalids, war orphans, war widows, the poor and those incapable of work, parents of the killed or those who died in the war enjoy special protection of the state and assistance . . . . . ." (Art. §32). "The supplying of provisions and other necessities for the army is carried out for just compensation" (§40). "Large private forest tracts

are expropriated according to law and become the property of the state or its self-governing bodies" (§41). "Expropriation of large estates and their apportionment to ownership to those who till the lands will be regulated by law" (§43).

Hungary.

The Hungarian Decree of August 21, 1919, guarantees in its very first clause that "All Hungarian citizens have completely equal rights. The fact that they belong to a racial minority cannot give them any privileges nor expose them to disabilities." The decree proceeds to regulate the use of languages in different places. In Hungary, the promises have not been faithfully observed and the minorities have raised bitter complaints which still reverberate through the chancelleries of Eastern Europe and find powerful echoes at Geneva. In spite of the categorical denials of the Hungarian authorities, there is reason to believe that the Decree has not been carried out in the spirit.[1] Every traveller in Eastern Europe has it brought home to him that Hungarian mismanagement may fire a conflagration. It is to be observed that the Hungarian Constitution is partly at fault. It is still mostly flexible and unwritten and does not admit judicial control. Hungarian experience strengthens the case for the type of constitution advocated in the preceding chapter.

Poland.

Following Articles 7—10 of her Treaty with the Powers, the Constitution of Poland (Sec. I, Art. 87 ff) guarantees the usual rights, such as equality before the law (§96), a sort of Habeas Corpus (§97), inviolability of

1 See the *Proceedings of the League of Nations*. Seton-Watson, *Racial Problems in Hungary*; C. J. Street, *Democracy in Hungary*.

the home (§100). More interesting are the provisions on rights which intimately touch minorities. Thus, every citizen has the right of preserving his nationality and developing his mother-tongue and national characteristics. "Special statutes of the state will guarantee to minorities in the Polish State the full and free development of their national characteristics, with the assistance of autonomous minority unions, endowed with the character of public law organizations, within the limits of unions of general self-government. The state will have in regard to their activity, the right of control and supplementing their financial means in case of need (§109). Polish citizens belonging to national, religious or linguistic minorities have the same right as other citizens of founding, supervising, and administering at their own expense, charitable, religious and social institutions and of using freely therein their language and observing the rules of their religion (§110). Freedom of conscience and of religion is guaranteed to all citizens. No citizen may suffer a limitation of the rights enjoyed by other citizens, by reason of his religion and religious convictions. All inhabitants of the Polish State have the right of freely professing their religion in public as well as in private and of performing the commands of their religion or rite in so far as this is not contrary to public order or public morality (§111)."

City of Danzig.

All the usual rights are guaranteed by the Constitution of the City of Danzig (Pt. II, Articles 77 ff, particularly §72, 73, 83, 84). A few provisions are particularly interesting. Thus, "the education of children to physical, intellectual and social efficiency is the highest duty and natural right of parents. The state shall supervise the execution of these duties"

(§80). "Full freedom of conscience and creed shall be established" (§95). "Arts and sciences and their teachings shall be free. The state shall provide for their protection and shall be bound to promote their interests in a liberal manner" (§100). The rights of property shall be assured. Expropriation shall take place only in accordance with the provisions of the law in the public interest and in return for due compensation; in case of dispute, recourse may be had to the decision of the courts (§109). Article 89 prescribes an obligation rather than a right when it declares that all citizens are bound to undertake honorary duties.

Esthonia.

The Esthonian Constitution (Section II, Art. §§6ff) lays down the same fundamental rights as other constitutions. Article 6 expressly prohibits any privileges or disqualifications from birth, religion, sex, rank or nationality.

Finland.

The new Constitution of Finland, given at Helingsfors on July 17, 1919 is in line with others in guaranteeing rights (Title II, Article §§5ff). The tone of one article invites quotation. "Every Finnish citizen shall be protected by law in his health, his honour, his personal liberty and his property. The labour power of citizens shall be under the special protection of the state. Expropriation for public utility purposes with full compensation shall be regulated by law." The eighth Title of the Constitution deals with education and *inter alia* declares that "the University of Helingsfors shall retain its right of autonomy. New regulations in respect to the principles of organization of the University shall be regulated by ordinance. In both cases the consistory of the University shall be consulted" (§77).

The Constitution of Denmark, besides the usual rights (§§79—92) contains two which are interesting enough for quotation. "Any person unable to provide for his upkeep and that of his dependents, has, if the duty of supporting him does not lie on any other person, the right to state-help on condition that he submits to the duties which the law prescribes in such matter" (§82). The next article grants poor children the right to free instruction.

Denmark.

The Mexican Constitution (as adopted on the 31st of January, 1917, amending that of the 5th of February, 1857) contains the usual guarantees and a few provisions which illustrate the peculiar needs of the country. Article §3 makes primary instruction free and all education secular. Slavery and forced labour are prohibited (§§2, 5); as also capital punishment for political offences (§23) and cruel punishments in general (§22). Article 33 (Ch. III) recalls the high-handedness of the United States when it lays down that "no foreigner shall meddle in any way whatever in the political affairs of the country." Article 123, divided into 30 sections, constitutes a veritable code of labour laws. Article 130 binds all ministers of religion to fidelity to the country.

Mexico.

The Italian Statuto (Art. §§24—32) contains the usual declaration of rights. So, too, the Norwegian Constitution (Art. §§95ff). The old Constitution of the Orange Free State directed the Volksraad (the Assembly) to promote religion and education and prohibited it *inter alia* from passing any law to restrain the right of public meeting.

Italy. Norway and Orange Free State.

The Irish Free State Constitution incorporates the Writ of Habeas Corpus as part of a clause (§6) which also declares that the liberty of the person is inviolable and no person shall be deprived of his liberty except in accordance with law, though nothing in this Article "shall be invoked to prohibit, control or interfere with any act of the military forces of the Irish Free State (Saorstât Eireann) during the existence of a state of war or armed rebellion." The next Article (§7) guarantees that "the dwelling of each citizen is inviolable and shall not be forcibly entered except in accordance with law." Subject to public order and morality, complete freedom of conscience and profession and practice of religion is guaranteed. Any established church is prohibited and a conscience clause is inserted in respect of all schools receiving public aid (Art. §8). "The right of free expression of opinion as well as the right to assemble peaceably without arms and to form associations or unions is guaranteed for purposes not opposed to public morality. Laws regulating the manner in which the right of forming associations and the right of free assembly may be exercised shall contain no political, religious or class distinction" (§9). "All citizens of the Irish Free State have the right to free elementary education" (§10).

The Irish Free State.

The Greek, Roumanian, Bulgarian and other constitutions contain similar declarations and guarantees.

Other Countries.

The English Constitution, perfectly flexible and largely unwritten, knows nothing of a Declaration of Rights. But the law supplies the gap for all practical purposes. In England the "rule of law" which is the funda-

England.

mental principle of the constitution means " the absolute supremacy and predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. English men are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else " (Dicey, *op. cit.*, 198). It means equality before the law, " the equal subjection of all classes to the ordinary law of the land, administered by the ordinary law courts " (*Ibid.*). In a few chapters[1] Dicey explains how the law of the land suffices to guarantee the rights which elsewhere are secured by the Instruments of Government. It will be observed that the end is the same; it is attained by one set of means in England; a different method has to be employed in countries which owing to historical exigencies are not so fortunately situated.

A formal Declaration of Rights is contrary to British practice but it is interesting to note that the Australian Constitution forbids the Commonwealth to " make any law for establishing any religion or for imposing any religious observance or for prohibiting the free exercise of any religion." Similarly, Article 93 of the British North America Act, 1867, contains some complicated arrangements on education and, as Lord Carnarvon said in the House of Lords in introducing the Bill, seeks " to secure to the religious minority of one province the same rights,

Australia.

Canada.

[1] See Ch. V, The Right to Personal Freedom; Ch. VI, The Right to Freedom of Discussion; Ch. VII, The Right of Public Meeting; Ch. VIII, Martial Law.

privileges, and protection, which the religious minority of another province may enjoy."

The Indian fundamental law need not go into such minute details as figure in many state constitutions, of the American Union. Nor need it comprise chapters of social and political sciences. But it should be comprehensive enough to cover some of the outstanding problems. The first principle to be enshrined in the Declaration of Rights ought to be that all Indians are equal before the law: that men and women have, in principle, the same rights; that no penal law, substantive or procedural, shall ever be passed to discriminate between any groups on the score of religion, race, caste or colour. Secondly, no citizen shall be deprived of the right of freedom of expression, of association and public meeting, save by due process of law. Thirdly, every citizen shall have perfect liberty of belief and creed and of cultivating his own language. There shall be no state religion in India and no person shall be compelled to attend any religious instruction in any school or college or other institution supported wholly or partly from public funds. Subject to public morality and order, all interference with the religious practices,—prayer, worship, sacrifices, processions, congregations, pilgrimages, bathings, festivals, fairs—and with the cultural observances and practices shall be prohibited. The right to a Writ of Habeas Corpus shall be guaranteed and shall not be suspended except by the Legislature under grave emergencies. No houses shall be searched except by due process of law. Bills of attainder and *ex post facto* laws shall not be valid. Freedom of movement throughout the country shall be guaranteed. Every child shall have the right

The Proposed Indian Scheme of Rights.

to free primary instruction. All facilities of higher education, technical instruction and vocational training shall be extended, without any discrimination, to all sections of the people. Besides these provisions there shall be others on the political rights of minorities to be explained later. All these rights, since they intimately touch the minorities, shall be open to amendment only with the consent of the minorities (to be specified) and of the country as a whole duly ascertained by methods which shall be explained in the chapter on the Amendment of the Constitution.

CHAPTER IV

THE INDIAN FEDERATION

In the present Government of India, an irremovable Executive is joined to a predominantly elective Assembly. The history of representative institutions in the British Colonies and in Central Europe proves that such an arrangement is productive of the maximum friction. A representative body always tries to stretch its powers to the utmost limits and to impose its will on the Executive, which, deriving its being from a different source, resists its extreme claims and refuses to bend. Nowhere has such a situation lasted for very long. The record of the relations of the Legislative Assembly and the Government of India since 1921 constantly reminds one of the constitutional experiments in Malta, the West Indies and Canada in the nineteenth century.[1] The moral is obvious. The Executive must be made responsible to the Legislature or the latter must be predominantly nominated and therefore amenable to executive control. In the Indian provinces, there are two executives; one is responsible to the Legislature, the other, the reserved half, is irremovable. The Reserved halves of the Provincial governments as well as the Government of India, are responsible through the Secretary of State for India

The Present Situation.

[1] Keith, *Responsible Government in the Dominions*; Egerton, *British Colonial Policy*; Wrong, *Government in the West Indies*.

to the British Parliament and ultimately to the British electorate. How far this control is to be transferred to Indian electorates working through elective legislatures has not yet been settled. But in the meanwhile, one may suggest principles and lines of organisation which should apply to whatever spheres may be open to popular control. In any case, it is desirable to clarify our ideas about the functioning of the democratic government which the future is expected to hold in store for the country.

The "Home" Government.

A word may be said about what is known as the "Home Government" of India. Any increase of responsibility in the Government of India will mean a corresponding relinquishment of control on the part of the British Parliament, the Cabinet and the Secretary of State for India. When full responsible government is attained, it may be desirable to abolish the Secretaryship of State for India, and to entrust the few remaining functions to the Secretary of State for Colonies. Or perhaps, if a foreign student may venture to express an opinion, it may then be advisable to have one Secretary of State for Dominions and another for the Colonies as distinct from the self-governing units. Into the scheme of Imperial co-operation and consultation as it has emerged from the half-conscious movements of the last forty years, India has already been admitted. Like the Dominions, India shares in the Imperial Conference. Beyond the Empire, she is an original member of the League of Nations and the International Labour Office and is a party to numerous international treaties and engagements. Here, then, no formal change will be needed. Only the High Commissioner for India will take over some of the present functions of the India

Office and, in addition, acquire the character of a diplomatic representative of the Government of India. The principal changes will take place in the constitution of Indian governance itself.

Trend of Indian History.

The immense size and population of the country and the existence of numerous autonomous states obviously militate against the adequacy and efficiency of a unitary form of government. As the Frenchman Lamennais put it long ago, centralisation produces apoplexy at the centre and anaemia at the circumference. Nor will a centralised Government of India be able to make the states part of one whole. Federalism in its regular, clear-cut form is a modern contrivance but its essential elements can be traced in the distant past. It is not generally known but it is a fact, borne out by all available literary and epigraphic evidence, that the ancient empires of India such as those of the Mauryas, Guptas, Vardhanas, Rastrakutas, Gurjara Pratiharas, and Cholas, were essentially federal fabrics which, though rather loose in texture and largely tinged with feudalism, uniformly permitted local autonomy.[1] During the Middle Ages, the Khilji, Tughlaq, Mughal and Mahratta empires greatly strengthened the centripetal forces, but owing to the vitality of the age-long tradition and the ever-present difficulty of communications they had to allow a good deal of power to local chiefs or governors. It was reserved for the British administration to give the *coup de grace* to all the elements of federalism within British India, to bring the unifying forces to a climax and establish a centralised, uniform

[1] See my *State in Ancient India, en passant.*

government at Calcutta under the control of Leadenhall Street.

Under British Rule.

The unprecedented vigour and efficiency introduced by the new rulers into the administration appeared to them to accord only with the concentration of authority. The process which began with the Regulating Act of 1773 was virtually completed in 1833 when the outlying presidencies of Madras and Bombay were deprived of all legislative powers and were told to seek their laws on the banks of the Hooghly. The Act that renewed the East India Company's Charter for another twenty years expressly laid down that the Governor-General-in-Council was to have full power and authority to superintend and control the Governors and Governors-in-Council of Bengal, Madras, Bombay, and Agra in all matters relating to the civil or military administration of their provinces and the Governors or Governors-in-Council were to obey the orders and instructions of the Governor-General-in-Council in all matters whatsoever. The Presidency Governments could only submit to the Governor-General in Council "drafts or projects of any laws or regulations which they might think expedient." These were to be considered by the Governor-General-in-Council and the resolutions thereon communicated to the Government proposing them. It was administrative necessity rather than any principle or well-thought out plan which later led to legislative decentralisation in a series of instalments. The first step was taken in 1861 when limited legislative powers were given to the Madras and Bombay Legislative Councils which were to consist of officials and a few nominated non-officials. In the case of measures affecting the public debt, the customs, currency, posts, telegraphs, penal code, religion, navy and army,

foreign affairs, patents and copyrights, the previous consent of the Governor-General was necessary for the introduction of any Bill. In all cases the consent of the Governor and the Governor-General was required to give validity to a measure, while the Crown, through the Secretary of State for India, could always disallow a law or a regulation. As for finance, until 1871, "the whole of the revenues from all the provinces of British India were treated as belonging to a single fund, expenditure from which could be authorised by the Governor-General-in-Council alone. The Provincial Governments were allowed no discretion in sanctioning such charges. . . . If it became necessary to spend £ 20 on a road between two local markets, to rebuild a stable that had tumbled down, or to entertain a menial servant on wages of 10s. a month, the matter had to be formally reported to the Government of India."[1] The resulting wrangle, friction, delays and waste led the Governor-General Lord Mayo to devolve some power and discretion on the provinces. The system of "Provincial Contracts," as it was called, was gradually improved and extended by successive Governors-General until the provinces acquired a real, direct interest in revenue and expenditure. At the same time legislatures with powers strictly limited as in the case of Bombay and Madras were established in Bengal in 1862; in the North-Western Provinces in 1886; in the Punjab and Burma in 1897; in Assam and Bihar and Orissa in 1912, and in the Central Provinces in 1913. The greatest step forward was taken with the Montagu-Chelmsford Reforms. "The Provinces are the domain" said the Joint Report (para 189), "in which

[1] Strachey, *India, its Administration and Progress*, 3rd edition, pp. 112-13.

the earlier steps towards the progressive realisation of responsible government should be taken. Some measure of responsibility should be given at once and our aim is to give complete responsibility as soon as conditions permit. This involves at once giving the provinces the largest measure of independence, legislative, administrative and financial, which is compatible with the due discharge by the latter of its own responsibilities." The preamble to the Government of India Act of 1919, similarly declared that "whereas concurrently with the gradual development of self-governing institutions in the Provinces of India it is expedient to give to those provinces in provincial matters the largest measure of independence of the Government of India . . ."

So a decisive measure was adopted when certain subjects were transferred to ministers responsible to the Provincial Legislatures and were thus finally freed from the control of the Government of India. The latter has partially relaxed its control over the reserved half as well, while undoubtedly larger powers of raising revenue, borrowing and spending money have given the provinces a status and dignity they never possessed before under British rule. This step forward was taken with the Devolution Rules which were made by the Governor-General-in-Council in exercise of the powers conferred by sections 45-A and 129-A of the Government of India Act with the sanction of the Secretary of State-in-Council, which were approved by both Houses of Parliament and which were notified from Delhi on December 16, 1920. In this whole history of the relations of the Government of India with the provinces since 1773, the remarkable fact is that centralisation did not work well and decentralisation was, by sheer

Since 1918.

The Moral of it.

force of administrative necessity, carried out in successive stages. The railroad, the post office and the telegraph had come to the aid of the Central Government and facilitated its supervision and control of provincial administrations, but they did not avail to sustain the concentration of authority. The Government of India could not fulfil even the legislative needs of the provinces and had to establish Councils therein. Centralisation had been tried and failed. Now in the interests of administrative efficiency and democratic control the process of Devolution has to be carried further and the provinces raised to the rank of States, as autonomous components of a federation.

The Position of Provinces.

So far as the provinces are concerned, the circumstances attending the establishment of federalism are different from the conditions which led to the formation of the United States, the German Confederation and Empire, the Swiss Federation, the Dominion of Canada, the Commonwealth of Australia, and the Union of South Africa. In all these lands the States had existed for long independent of each other and had developed a strong loyalty, patriotism and peculiar interests. They were then prompted by exigencies of defence and of economic and cultural life to form a Union and part with certain powers in its favour. They were naturally reluctant to diminish their existing sovereignty and joined in a federation only from sheer necessity or from prospects of undoubted advantages. In India, the situation reminds one of the partial federalisation of Austria and the partial segmentation of Prussia after the War. The provinces have long been subject to the Government of India and have no sovereignty to lose, no status to forfeit. Based on historical accidents and administrative convenience,

regardless of cultural, linguistic and, in some cases, even of geographical factors, they have remained for the most part mere administrative units. Bengal alone, the most homogeneous of provinces, has developed a strong provincial feeling. Nationalism inspired by common political aspirations, encouraged by common economic interests and assisted by the facilities of communication has put provincial patriotism at a discount. Nor has communalism promoted the growth of provincial loyalty. Communal lines running horizontally cut across the provinces and encourage the organisation of large groups from different provinces against similar combinations. No province ever thinks of itself as a state. The situation, pathetic as it is from one point of view, presents certain undoubted advantages. We have none of those difficulties to overcome which hindered the emergence of Federal Unions in many countries and often threatened to defeat all attempts in that direction. In the absence of any jealousies to satisfy, we can easily reserve to the National Government all the powers necessary for the discharge of functions common to the whole country and for securing inter-provincial co-operation. We can incorporate in the constitution such prohibitions and directions as may keep the provincial governments on lines of efficiency and progress. On the other hand, there is an undoubted risk. The helplessness of the provinces may encourage a disregard of their rightful status and lead to a unitary rather than a federal form of government.

Localism and Democracy.

All historical experience proves that democracy functions best in small areas The average man feels keener interest in things nearer home, in affairs which touch him more or less personally, in men whom he has a

chance of seeing and hearing. Consistently with efficiency and the larger interests, there ought to be as much self-government as possible in the village, the town, the district and, for common affairs, in the province. There is no other way of awakening the political sense of the people and sustaining their interest in public affairs.

Administrative Efficiency.

At the same time devolution is best calculated to serve the needs of administration. Local or provincial authorities will be best qualified to gauge the requirements of their jurisdictions and think out and apply appropriate remedies. Countries far smaller than India have felt the need of devolution. In response to a resolution passed by the House of Commons on June 4, 1919, the Prime Minister of England appointed a Conference of Devolution presided over by the Speaker of the Commons in October, 1919. Reporting in April 1920, it presented two schemes, one associated with the Speaker and the other with a member, Mr. Murray Macdonald. Both were in favour of subordinate legislatures. It was suggested that some powers should be assigned to the local legislatures, some to the central one and others shared between the two. The suggestions were not carried out, but they represented an unmistakable trend. After the War, Austria was reduced to a small state with a population of less than seven millions but she carried out a scheme of federalisation and set up eight states. The new constitution specified that over one group of subjects the Federation was to exercise both legislative and executive control, over a second and much less important group, it was to legislate, but the states were to execute, subject to federal supervision; over a third group, the federation was to legislate only so far as fundamental

principles were concerned, leaving all else to the states (Arts. 10—12). The residuary powers were to belong to the states [Article 15 (i)], though hardly any were left after the enumerations. The Federation reserved control over all national, state and local revenue, as also over state administration in general (Arts. 13, 14, 16). This is not true federalism but the amount of devolution it represents is remarkable for such a small country. If Czecho-Slovakia and Jugo-Slavia did not adopt federalism, it was chiefly because of some racial groups which might have fallen a prey to the machinations of neighbouring states. Regionalism and Decentralisation which represent magisterial protests against the concentration of authority at Paris are now powerful movements in France.

Other Advantages of Federalism.

By way of important incidental advantages, federalism diminishes social discord or economic crisis by localising them, and facilitates legislative and executive experimentation. In the general interests of national progress it is desirable to have a number of radiating centres of life and culture. In a centralised state the capital tends, like Paris in France, to draw all the highest talent to itself and leave the mediocrities to the provinces. The danger is not so serious in large countries as in comparatively small countries. Nevertheless it is a real danger and must be guarded against by federalisation of authority.

Type of Indian Federation.

For India, then, the most desirable form of political organisation seems to be federalism which answers best to the requirements of democracy, administrative needs and national progress and which also harmonises with the age-long trend of Indian history. To enable the prov-

inces to develop a high sense of responsibility it is advisable to leave them complete power within well-defined limits. Each province should be furnished with a constitution which, while conforming to the Federal Constitution, the supreme Fundamental Law, in all respects, should prescribe the spheres of operation of the various provincial organs of government and which should be capable of amendment within the province. It should be understood that any federal statute or executive action which was found to encroach on the powers assigned by the Federal Constitution to the provinces would be declared *ultra vires* by the courts in any case which might come before them. Similarly, the existing sources of revenue should be divided by the constitution between the Federation and the Provinces, either being authorised to seek further revenue from specified sources and to borrow freely in the market. In short, subject to the Fundamental Law, with all its guarantees for individual and group rights, its demarcations of authority and the obligations imposed by it, a province should be an autonomous state, not to be interfered with by the national government except in case of serious internal disturbance of the peace and then in accordance with conditions prescribed by the Constitution. Points of disputed jurisdiction should rest with the courts for final decision. Since no human eye can foresee all the problems and emergencies which the future may bring, it is necessary to fix the location of residuary powers. These may possibly relate to the country as a whole or more than one province and should therefore be left with the National Government. Such a type of federation would roughly correspond to the American and the Australian except that the Federal powers would be wider and would include

all residuary powers. It seems preferable to the Canadian type which reserves all Provincial Bills for Federal approval and thus checks the growth of responsibility in the provinces. Any one who feels his interests adversely affected by a provincial statute may petition for its disallowance at Ottawa ; sometimes, in fact, the parties engage counsels who are regularly heard by the Minister of Justice. It need hardly be added that the present proposal differs radically from the South African Constitution, which, dreading the " Native " peril, established a practically unitary government and consigned the Provincial legislatures to an advisory rôle.

The Federation and the Provinces.

In the scheme as outlined above the Provincial governments, so long as they act within the assigned limits, shall not be subordinate to, but co-ordinate with, the National government. Neither will be responsible to the other though both shall be bound to obey the constitution on peril of their actions being declared *ultra vires* by the courts. Every citizen will obey the Provincial government in some matters and the Federal Government in others. Only in extreme cases in which provincial mismanagement may threaten entanglement with foreign countries or result in serious domestic insurrection should the National Government, as empowered by the constitution, interfere and that just to set matters right and retire as promptly as possible. Such interference would be justified on the principle that in the last resort the National Government must be responsible for all relations with foreign nations and for the maintenance of peace—a principle which has been freely admitted in the United States where the doctrine of state-rights long held such powerful sway. The Constitution lays down that the Federation is

bound to protect a state against domestic violence on the application of the Legislature, and in its absence, of the Executive, of the state. But even in the absence of a regular application, the President can, though he is not bound to, take the necessary measures. The Federal President freely used his power to defend states against domestic violence, in 1840—42 in Rhode Island, in 1873 in Louisiana and in 1894 in Illinois. As early as 1794 when the legal position was not free from doubts, the Federal President, George Washington, suppressed the Whiskey Insurrection in Pennsylvania by the militia of that state as well as that of New Jersey, Virginia and Maryland. The constitutional issue came to a head in the time of President Cleveland whose action in despatching Federal troops to put down Chicago disturbances in connection with the Debs strike was objected to by the Governor of the State as illegal. The President stuck to his guns, and his injunctions were sustained as valid by the supreme court in a Habeas Corpus suit. In Switzerland, also, the internal safety, order and peace of the country is definitely a federal concern. The Australian Constitution binds the Federation to repress domestic violence on the application of the executive of a State. The Canadian Constitution makes the Federation responsible for the maintenance of order and peace in the provinces. The Indian Constitution might incorporate the provision that in case of actual or imminent trouble with a foreign state or in case of a serious disturbance of the peace, the Federal Government is bound to interfere on the application of the Provincial Executive or Legislature and *may* interfere of its own accord to set matters right. But ordinary mistakes and maladministration should be left to be corrected by the good sense of the provincial electorate.

Such a scheme of governance may appear radical to many—an attitude only natural in a country which has no clear idea of its ancient principles of political organisation and which is familiar only with a centralised polity. But there are two considerations which may suffice to dispel the apprehensions arising from a laudable anxiety to secure peace, order and good government in the whole country and to strengthen the forces of nationalism.

Growing strength of Federations.

In the first place, all historical experience shows that, in spite of guarantees to the contrary, the Federation always tends to grow in power, prestige and public affection and allegiance at the expense of the component groups. A federal state is never static ; occasionally it is moving towards dissolution, generally towards centralism. The extremely loose Swiss Confederation has ended, after a series of sudden as well as gradual changes, in a real National Government overshadowing the Cantons. In the United States, the enthusiasm and loyalty for the States, rooted deeply in history, fired by the eloquence of Jeffersons and Calhouns, and championed by the powerful, well-organised Democratic party, have not prevented the growth of the national idea. Though wide specific and all residuary powers have been left with the states, and guaranteed by a constitution alterable only with the greatest difficulty and then only with the consent of at least three-fourths of the States, the Federation has, as it were, been steadily swallowing up the confederates. The progress in industry and commerce, the railroad, the telegraph and the long-distance telephone, the natural development of cultural homogeneity, the mere habit of obeying a government—all these have, even in the absence of any strong external pressure, created a nation out of the desperate communities which

were induced with enormous difficulty—coaxed with many promises and assurances—to enter into a federation in 1787. The German Zollverein, a mere Customs Union formed in 1833, gradually acquired a political significance and became the foundation of the federal empire which arose after the events of 1866 and 1870, to dominate the continent for more than a generation. That empire in its turn gradually strengthened its central institutions until the Republic, which succeeded it in 1918, stands forth as more of a unitary state than of a federation.

Similar accessions of strength may be noticed in the history of Canadian and Australian federations. Such is the story of political organisms which started with the strongest traditions of localism and the keenest jealousies of federal powers. India starting with traditions of centralism and with provincial helplessness will continue predominantly centralistic unless she takes special measures to guarantee powers to the provinces. The fact is that science has given an almost irresistible momentum to unifying forces and by fostering cultural intercourse, creating wider economic interests and standardising life, strengthened centripetal forces. The problem of political organisation is to counteract the excesses of this powerful tendency and to invest local institutions with such authority as is essential for the working of democracy and efficiency of administration. There is no reason to doubt that in India the forces which make for a strong national government will gain in momentum in succeeding decades. Language, indeed, constitutes a real difficulty and the growth of vernacular literatures, laudable as it is, does seem at first sight to threaten the cultural homogeneity which has always been such a marked feature of Indian history. But the

Indian Conditions.

study of Sanskrit and Persian is not likely to disappear; English has become a new means of communication all over the country; and the efforts which are sure to be made for the adoption of Hindustani as the *lingua franca* will go a long way to meet the difficulty. Even in the absence of a common language, science and economic forces will continue their work. From the political point of view, it is the provinces rather than the Federation which require safeguards and a fair amount of guaranteed independence. In the second place, it may be pointed out that residuary powers can be left with the National Government, that the detailed fundamental law can be used to keep the provinces in check, that the provincial constitution may be relied upon for further checks on the provincial executives and legislatures, that, in any case a large number of important subjects will belong exclusively to the federation, that in certain matters there may be concurrent jurisdiction with the prior right to the federation and that lastly, the power to interfere in cases of serious disturbance will always serve as a valuable guarantee. The experiment here advocated may seem novel to the present administrative tradition in India but it is by no means dangerous. On the other hand, democracy may not, without it, have a fair chance in the country. The examples of Canada and South Africa are hardly to the point; both are sparsely populated, while the latter is also a close white oligarchy far outnumbered by coloured races and therefore desiring a centralised administration. It was long believed that federalism meant weak government. But the rôle of the United States in 1917-18 gives the lie to the charge. Germany became a great power under a Federal form of Government and her collapse in 1918 was in no way due to federalism.

On a comprehensive view of the functions of government it will appear that there are some which concern the whole country, which demand uniform regulation or the collective might of the nation for their due performance and which should therefore belong exclusively to the Federal Government. There are others which may be peculiar to the provinces or in which variety of experiments according to local requirements is desirable and which, therefore, should belong exclusively to the provinces. There are others still which stand midway and about which, therefore, it should be laid down that the Federation may move in regard to them and, failing that the provinces should manage them, subject to any Federal statutes and instructions.

Division of Powers.

It need hardly be argued that defence, including control of the army, the navy and the air-force, should be a federal concern and should not be left to the provinces at all. The American Constitution, indeed lays down that a state actually invaded or threatened with imminent invasion might resort to war. But the Article was framed in the eighteenth century when the railroad, the telegraph, the telephone and the wireless were unknown. Matters relating to defence must be governed by a unified policy for the sake of consistency, efficiency and effect. Similarly, foreign policy should be an exclusively federal affair. The British Empire is likely to have a single foreign policy in all essentials, in the formulation of which the Dominions are almost sure to be consulted. India will continue to share in the general Imperial counsels and decisions but in the immediate

Federal Powers.

Defence.

Foreign Affairs.

neighbourhood she may, as she does at present, have a foreign policy of her own, of course, in general accord with the larger policy. The Indian frontier touches several independent countries or lies within striking distance of them. Afghanistan, Baluchistan and Persia on the north-west; Nepal, Bhutan and Tibet on the north; and Siam, Indo-China and China on the east, lie within the orbit of a direct foreign policy. The German Constitution (Art. 79—83) reserves national defence, colonial affairs, merchant ships and customs to the national authorities but Article § 78 permits the states to make treaties with foreign states on matters which fall within their legislative competence, with the approval of the Reich. The Swiss Constitution, indeed, authorises a Canton to enter directly into commercial treaties with foreign nations with the approval of the Federation. But such a power is fraught with danger in days when tariffs may any day lead to international complications and when divergent tariff policies may spell grave confusion. The grant of any such powers would be doubly inexpedient in India whose foreign policy will have to be adjusted to that of the Empire. With other members of the British Empire such as Ceylon, South Africa, East Africa, Canada, Australia and British Guiana, the Federation will be expected to deal by means of such instruments as the Empire may evolve. Within the borders of India all dealings with the Indian States must be managed by the Federation and not by the Provinces. Here, too, the Federal legislature or executive will not be completely free agents. They shall respect the existing treaties, engagements and sanads except as they may be modified with the consent of both parties. Any transaction which might appear to violate the Treaties,

The Indian States.

etc., could be taken to the courts, and, if declared *ultra vires*, would be set aside, and appropriate damages paid. Subject to the treaties, it will be for the Federation to negotiate with the States about any military, economic or other affairs, to appoint and control Agents and Residents, to receive and make such payments as may be due on either side. These powers in the matter of defence, foreign policy and relations with Indian States carry with them as a corollary, control of shipping (except coastal shipping under conditions), railways, post offices, telegraphs and long-distance telephones. The strategic importance of these services is patent; they also concern the whole country and require uniform regulation. Even in Switzerland where localism is deeply rooted, the Federation has taken over the conduct of all services of national importance.

Means of Communication, etc.

Similar reasons apply to tariffs and customs. For the sake of uniformity which is indispensable, currency, weights and measures[1] should also be federal subjects.[2] The taxation of incomes requires uniformity and must be a federal affair in order to prevent unnatural flow of capital from province to province and fraudulent account-keeping on the part of those who may have dealings in more than one province. It follows that major ports, port quarantine, marine hospitals, lighthouses, beacons, lightships and buoys must be federal subjects. Navigable waters used for inter-provincial commerce must be governed by Federal Law. On this point, the

Commercial matters.

[1] *Cf.* The Austrian Constitution, Article 4 (1-2).

[2] *Cf.* The German Constitution, Articles 88, 92—4.

constitutional position in the United States is thus summed up by Woodrow Wilson:—

"Federal law controls all navigable waters which constitute natural highways of interstate traffic or intercourse, whether directly or only through their connections; it not only extends to such waters but also to the control of the means by which commerce may cross them in its land passage, to the construction, that is, of bridges over navigable waters for the facilitation of land traffic. It excludes every state-tax or license law, every state regulation whatever, that in any way affects by way of restriction or control any movement of commerce or intercourse between the states."[1]

So too pilgrimages beyond India, emigration, immigration, naturalisation and aliens, which may occasionally involve large issues of policy, should pertain to the Federation. It need hardly be added that the Indian Public Debt, the Indian Audit Department, the Indian Public Services Commission and the Indian Census must belong to the Federation. Similarly, criminal and civil law, both substantive and procedural, except such as may relate to provincial or concurrent subjects, should be a federal concern though its administration should, as in Germany and Switzerland, be left to the provinces, subject to any special jurisdiction vested in the supreme Federal Court. Monopolies such as those of salt and opium should be federal.

Alteration of boundaries.

The alteration of provincial boundaries is obviously a federal matter. The constitution of the United States demands the consent of the Congress and the Legislatures of the States concerned for any change in boundaries.

[1] Woodrow Wilson, *The State* (Revised edition), p. 310.

The new Austrian Constitution [Article 3 (ii)] lays down that the boundaries of States can be altered only by concurrent constitutional laws of the Federal State and the State affected thereby. The agitation which continued for years after the Partition of Bengal in 1905, and the controversy to which the proposed separation of Sind from Bombay has given rise, show that the subject is a very delicate one. In view of the religious and linguistic character of the minorities likely to be affected, the Constitution should lay down that the Federal Government may arrange for plebiscites to be taken in the areas proposed to be separated. If it be proposed to join these areas to any of the existing provinces, then the consent of the provincial legislature should be essential to the projected amalgamation.

Marriage and Divorce.

There are reasons why marriage and divorce should be regulated by the Federation alone. It appears from recent trends of opinion in the press and in periodical literature as well as from the proposals before the Legislative Assembly that the near future may witness some important legislation on marriage and divorce. As the social conditions and ideas alter, the existing laws of marriage and divorce will have to be amended. Here a uniform policy is absolutely essential. The United States has paid heavily for leaving these matters to the states, which have tried some bold and divergent experiments with the result that a marriage or divorce contracted in one state may not be valid in another. It is a practical disadvantage not to know whether on migration to another province you are bound in matrimony or still in a state of single blessedness, whether you are really divorced or are still tied to somebody with whom you

have nothing to do. In America divergence of laws on marital relationships has encouraged fraudulent marriage and collusive divorce.

Religion.

The Fundamental Law shall forbid an Established Church in India and bar all interference with religion. Toleration shall be the only injunction of the state on religion. But it is possible to imagine aspects of Civil Law or other matters demanding legislation which may be supposed to have a religious tinge. In all such affairs a uniform policy is desirable. It may, therefore, be broadly prescribed that religion and matters like adoption, inheritance, status and rights of wives, mothers, daughters and other relations, should be dealt with by the Federation.

Other Federal Subjects.

There are some other matters which must be regulated on national lines and must therefore be assigned to the Federation. Copyright, as at present, must be uniform throughout the country and the Federation, like other members of the British Empire, may enter into international agreements on the subject. It may be added that the capital of the Federation should not form part of any province but should be directly administered through a Commissioner, by the Federal Government.[1] It will be desirable to reduce the present size of the province of Delhi to the city and its environs, so as to relieve the National Government from responsibilities which should, properly, be shouldered by the provinces. The territory immediately surrounding the capital should provide enough room for expansion and improvement.

[1] *Infra*, Ch. VII.

There are matters which may partly demand all-India regulation and partly special treatment in the various provinces. These may be grouped under concurrent jurisdiction, with priority to the Federation. The latter may at any time move in regard to them and its statutes shall prevail over any existing provincial legislation. But it may, in any such matter, content itself with issuing instructions to any province, instructions which must be adhered to, failing which the provincial measure may be vetoed or replaced by a federal statute. Lastly, the Federation may, if it thinks fit, leave a province at perfect liberty to deal with any such matters, interfering only at the call of all-India or international interests and obligations.[1]

Concurrent Jurisdiction.

Roads have a strategic importance, and may run through more than one province. The general policy governing the great highways must, therefore, be determined by the National Government; its execution may or may not be left to the provinces. Local roads, on the other hand, may be safely left to the provinces. Irrigation should, for the most part, be assigned to the provinces but the Federation must be

Roads.

Irrigation.

[1] *Of.* the German Constitution, Articles 7—12.

In Switzerland, pre-eminently the country of local government, besides defence, foreign affairs, etc., the customs, coinage, posts, telegraphs, telephones, and the gunpowder monopoly are entirely federal subjects. Hydraulic power, weights, measures, etc., are legislated on by the Federation but administered by the Cantons. The alcohol monopoly is administered by Federal officials but the proceeds are divided among the Cantons. Primary education is Cantonal but the Federation may grant subsidies. Besides, the Federation may construct at its own expense, or subsidise the construction of, public works required for the whole or a part of the country. Labour insurance forms a Federal affair.

invested with control over the policy governing canals which extend over more than one province or which may possibly drain off too much water from rivers which run into another province. Coastal shipping, which may touch more than one province, must be governed from the National Capital but the smaller type of craft may be regulated by the provinces concerned. Fisheries which may lead to entanglements with foreigners should be governed by federal statutes but legislative and executive power may partly be left to the provinces affected. Prohibition is obviously a federal matter for no province can hope to be completely dry if its neighbours are wet. But unless and until prohibition is enacted, local option and the manufacture, sale and consumption of alcoholic drinks should be left to the provinces under such general directions as the Federation may issue. Surveys like the Geological, Botanical, Zoological and Archæological and Metereology demand uniform lines of progress and should be subject to federal statutes and instructions but their details might be left to the provinces.

Coastal Shipping.

Prohibition.

Of yet deeper import among the subjects of concurrent jurisdiction is that species of legislation which pertains to labour and its relations with capital and with government. All over Europe, labour conditions present difficult problems of minimum wage, hours of work, sanitation, housing, insurance, pensions, status of trade-unions, unemployment relief, co-operation and control of industry. The Dominions, the United States and Japan have to handle similar problems. In India, the recent strikes and lock-outs, and the clear emergence of organisations of capitalists and labourers indicate

Labour Legislation.

that, with the progress of industrialisation, this social and economic problem is likely to assume serious proportions all over the country in the near future. As elsewhere, it is likely to become a country-wide problem, though, of course, there will be many purely local issues. It will demand a national solution. Longer hours of work or lower minimum wages in a province may mean acute labour discontent or an unnatural migration of labourers or a great advantage to capitalists in competition with other provinces. The organisations of capitalists and labourers alike are fast assuming national proportions and will, doubtless, press for national settlements.

International Significance.

Labour legislation, however, has also an international significance and is now partly based on policies laid down at international conferences. The root of the matter is that economically no nation is independent today; the world is becoming a single economic unit. Industry and Commerce—raw materials and manufactures, finance and banking, labour and capital—all have transcended national boundaries. Strikes, technical inventions or new methods of organisation, lock-outs and increases or reductions of wages in one country always have repercussions on the economic system of other lands. Labour has long felt that its grievances are in essence the same everywhere, that its strength lies in international combination and that its supreme organisations, its principles and programmes of action should be international. The leaders of Trade Unionism, Socialism and Communism in the nineteenth century gave the working men's movement an international turn which, in spite of the almost fatal effects of wars, it has retained ever since. It was indeed inevitable that Governments

should legislate on labour conditions on a national scale but, owing to similar labour programmes, a good deal of such legislation in which Germany led the way, followed similar lines in Central and Western Europe, in the British Dominions and, to a lesser extent, in the United States and Japan. A fresh chapter opened with the establishment of the International Labour Office at Geneva after the war. It has been organising annual and *ad hoc* conferences of representatives of employers, workmen and governments from practically all over the civilised world and has chalked out important programmes of legislation on hours of work, female and child labour, sanitary conditions, compensation for injuries, insurance, etc. Various governments have undertaken to enact measures on those lines India has already carried out the Geneva programme in a large measure. The international discussion and settlement of labour problems is likely to increase in future. India ought to be able to speak as a unit before these world gatherings and promptly to execute agreements to which she may be a party. It means that social legislation of this description should lie under federal jurisdiction in the new constitution. Contrary clauses in the American Constitution framed before the Industrial Revolution and the emergence of the Great World Society have led to undesirable complications. The Union Government cannot hope to persuade states to enact legislation to which it is itself inclined to agree in consonance with other countries. Within the Union itself, the lack of federal control has caused inconvenience and might have led to serious inter-state complications but for the comparatively small population and almost limitless resources and capacity for organisation resulting in fabulous accumulations of wealth which have raised the standard of

life and wages all over the Union. India with her enormous population and deplorable poverty can scarcely follow the example of the United States. Even the latter had to establish an Inter-state Commerce Commission in 1887, charged with the regulation of certain economic matters.

But while federal jurisdiction in this matter is essential both from the national and international standpoints, it must be admitted that sometimes provincial legislation may be desirable to deal with conditions and problems peculiar to a few localities. Assam, for instance, may need special regulations for the tea-plantations; Bengal for the jute industry; Bihar, for the indigo; Bombay, for the textile; and so on. A province may stand in need of a special Trades Disputes Act, a Conciliation Board with special powers. It may, therefore, be laid down that while the Federation will have the prior right to legislate on labour problems, the provinces should, subject to any Federal statutes and instructions, legislate for themselves.

Provincial Subjects.

There is a large number of subjects which require local treatment or experimentation and which may be made over entirely to the provinces. The provinces will in this sphere be sovereign with complete liberty of management. The maintenance of law and order in the province should rest with the provincial government unless some serious breach of the peace takes place.

Police.

The police shall be a provincial matter.

Agriculture, etc.

Agriculture, irrigation (subject to the conditions already set forth), land revenue, land tenure (which varies from province to province), tenancy legislation and therefore famine-relief should obviously be provincial. Industry and commerce (subject to reservations under concur-

rent jurisdiction) will likewise be best dealt with provincially. So too, mines and forests. Education (except of course, military, naval and æronautical education), public health and sanitation, which must always be adapted to local requirements and which offer abundant room for useful experiment should be exclusively provincial. All patronage of art and literature, libraries, museums, etc., regulation of theatres, circuses, cinemas, music halls, races, parks, baths, pleasure-grounds, gymnasiums, etc., should belong to the provinces. Local self-government—in districts, towns, talukas, villages—should likewise be regulated by provinces. The Federal legislature can hardly be expected to possess the local knowledge requisite for legislation. The provincial government alone will be able to furnish such advice, superintendence, and guidance as the various organs of local self-government may require. An exception should be made only in the case of the federal capital which shall not form part of, nor enjoy the status of, a province and the municipality of which shall accordingly be legislated on by the Federation.

Culture, etc.

Besides these major subjects there are a host of others which should be dealt with provincially. Among them may be mentioned vital statistics, pilgrimages within British India, public works in general (including bridges and excluding railway bridges), ferries, tunnels (excluding railway tunnels), ropeways and causeways (except such as may be declared by the Federal Government to possess military significance), tanks, anicuts, drainage, court of wards, veterinary departments, land-acquisition, registration of deeds and documents, religious and charitable endowments, factories (subject to the conditions mentioned above), electricity, boilers, gas, smoke nuisances, adultera-

Other Provincial Subjects.

tion of foodstuffs, betting and gambling, prevention of cruelty to animals, protection of wild birds and animals, control of poisons, reformatories, vagrancy, cocaine, etc., coroners, prisons, pounds, and trespass of cattle, treasure-trove, local fund audit, provincial law reports, provincial elections (subject, of course, to the constitution), improvement trusts, town-planning, colonisation within the province, provincial government presses, fees, including court fees, probate duties, succession or estate duties, petroleum and explosives, control of newspapers (subject, of course, to the Constitution), regulation of medical and other professional qualifications and standards, provincial stores and stationery.[1]

Finance.

Any scheme of provincial autonomy must involve (as the Montagu-Chelmsford Report, 200-201 admitted) a complete separation between Indian and Provincial finance. The details can be worked out only by an expert committee but it may be added that financial autonomy should carry with it the power to go to the market.

Appointments.

The German Constitution (Article 16) lays down that "officials charged with the direct administration of national affairs in any state shall, as a rule, be citizens of that state." The same end is secured in the United States by the association of the Senate with the President in federal appointments. But in view of the system of open examinations discussed in a later chapter it appears neither necessary nor advisable to insert any such provision in the Indian Constitution. The successful candidates, it may be presumed, will select their own provinces for their careers.

[1] *Cf.* The Devolution Rules, 1920, already referred to.

In this scheme of the distribution of functions and powers it will be understood that neither the Federal Government nor the Provincial Governments shall encroach on each other's sphere, that they shall be co-ordinate so far as their exclusive functions are concerned, that on points of concurrent jurisdiction the provinces shall always give way to the Federation, that the Courts shall be empowered to declare, in the course of any trials, whether a particular Federal or Provincial statute or action conforms to these clauses of the Constitution, that any such statute or action, if declared *ultra vires*, shall *ipso facto* cease to be operative. The courts shall thus form the pivots of the working of the Constitution. Their judicial action may be expected to supply such deficiencies as actual practice may reveal in the Constitution. In the United States, Chief Justice Marshall who presided over the Supreme Court from 1801 to 1835 is reckoned among the fathers of the American Constitution. The doctrine of implied powers which he elaborated did much to adjust the working of the various organs of government in their mutual relations. Judicial interpretation has integrated the constitutions and statutes of the Union and the States and fitted them into one harmonious whole.

The Function of Courts.

Every Indian province, big or small, will enjoy the same political status and dignity, and stand in the same relation with the Government of India. The case will be different so far as the Indian States are concerned, which present an extraordinarily complex problem.[1] In the interests

The Indian States.

[1] The total area and population of the states, as compared to those of British India, are as follows, in round figures :—

of a clear understanding of issues, it must be emphasised that neither the states nor their relations with the British Government stand on a uniform footing. One has merely to glance at Sir Charles Aitchison's *Collection of Treaties, Engagements and Sanads relating to India and Neighbouring Countries*[1] to find that here, as in the ancient Roman Empire, the status of protectorate baffles definition and that the chiefships range between almost complete autonomy and almost complete annexation. By imperceptible degrees, their positions shade off into one another. Roughly, they fall into three grades : semi-sovereign states which have surrendered only definite powers to the Paramount Suzerain and retained the rest; states which have surrendered a greater number of powers and, by treaty, admitted the suzerain's right to interfere in the internal affairs in certain contingencies, and lastly, states which are definitely and incontestably, mere dependencies of the suzerain. Records which might throw light on the practical implications of these differences of status are still confidential. In addition to original treaties, etc., there are numerous railway, postal and other arrangements concluded between the States and the Government of India.

Ever since the transfer of power from the Company to the Crown in 1858, the action of the Government of India has tended to standardise the status of the states and its relations with them. It has lowered the position of some and raised that of others. In practice, again,

Indian States.	British India.
Nearly 711,000 sq. miles; 88·8 p. c. of the whole.	Nearly 1,094,000 sq. miles.
Nearly 72,000,000, inhabitants; 22·5 p.c. of the whole.	Nearly 247,000,000 inhabitants.

[1] Revised by the Authority of the Foreign Department o the Government of India (4th edition, Calcutta, 1909).

the Government of India have exercised much authority, in relation to succession, deposition, contributions, superintendence and direction, which in some cases does not seem to flow clearly from the letter of the treaties. The situation was authoritatively summed up by the Governor-General, Lord Reading, in a letter to the Nizam of Hyderabad, dated March 22, 1926. "The Sovereignty of the Crown is supreme in India," he asserted, "... *Its supremacy is not based only upon treaties and engagements, but exists independently of them*, and quite apart from its prerogative in matters relating to foreign powers and policies, it is the right and duty of the British Government, while scrupulously respecting all treaties and engagements, to preserve peace and good order throughout India. The consequences that follow are so well-known and so clearly apply no less to your Exalted Highness than to other rulers that it seems hardly necessary to point them out . . . the British Government is the only arbiter in case of disputed succession.

"The right of the British Government to intervene in internal affairs of Indian States is another instance of the consequences necessarily involved in the supremacy of the British Crown . . . Where Imperial interests are concerned or the general welfare of the people of a state is seriously and grievously affected by the action of government, it is with the paramount power that the ultimate necessity of taking remedial action, if necessary, must lie."

Here was a clear exposition of implied powers, a doctrine which is recognised in Constitutional law but which offers endless room for divergence of opinion. Recently, the prospect of changes in the constitution of the *de facto* Suzerain power has brought the controversy to public light and transferred it largely to the domain

of lawyers. To a student of political science and history, a few governing conditions are perfectly clear. In the first place, the case does not admit of the application of international law, which, moreover, is still only a body of maxims, customs and treaty-principles. By common consent international law applies to sovereign states and does not seek to regulate the relations of suzerains and feudatories, howsoever elevated their status might be. In the second place, the hard facts of geography and history have prescribed that every part of India should belong to the same political whole. There must be one paramount power ultimately responsible for the defence and peace of the whole country. In the third place, the differences that are bound to arise occasionally over the interpretation of treaties or agreements between a State and the Government of India should, if incapable of adjustment by discussion, be settled not by the latter as at present, but by a Supreme Court. A judicial tribunal accustomed to weigh evidence, is best qualified to pronounce on the meaning of the engagements and the extent of implied powers. It is, of course, understood that treaties can be modified by the mutual consent of the parties concerned. Subject to these conditions and to the treaties, engagements or sanads as they may stand at any moment, a state may voluntarily join the federal scheme. In that case its treaty shall continue to be deemed part of the Fundamental law, so far as it is concerned. There are precedents for making whole treaties part of the Fundamental law. The Irish Constitution (Art. § 2) frankly declares that "the Scheduled Treaty stands above the constitution and all legislation passed under it." Similarly, the German Constitution regards the Treaty of Versailles as part of the constitution, a position which though interpreted by some German lawyers

as a denial of sovereignty, is explained by other commentators as a voluntary limitation of sovereign powers. An Indian State entering the Federation will be entitled to elect as many members to the Federal Lower Chamber as its population entitles it to and as many members to the Upper Chamber as the general constitutional provisions entitle it to, under such franchise as may apply to all the provinces. It will have the same rights as provinces of sending its quota to any Federal Economic Council or a similar body that may be set up. Such members shall have all the privileges of provincial representatives and shall, like others, be entitled to hold any office. Federal statutes and ordinances shall apply to such a state only so far as they are not repugnant to the treaty; but it will be open for the government of the state voluntarily to give effect to them even when they are repugnant to such treaties. For instance, a federal statute on coins, weights, measures or labour conditions shall either not apply at all to a state-member of the Federation which, under treaties, retains autonomy in these matters, or shall apply to it only so far as it is acceptable to its government. But it will apply to some other state-member, which, under the treaties, does not enjoy those rights. Such an arrangement will not at all violate the existing autonomy and rights of a state. It will place the views and interests of the state before the Federal Legislature through its accredited representatives and probably induce it so to frame its measures as to make them acceptable to the governments of the state-members.

The national legislature shall have no power directly to tax the state-members, unless they voluntarily consent to assume the status of provinces. There are many small states which do not at present enjoy even

the status, autonomy and privileges which this scheme recommends to all the provinces irrespective of their size and population. It may be suggested that such a status should be conceded to them if they consent to join the federation as integral members. Their ruling chiefs will become hereditary Governors retaining such powers as may be agreed upon. Their states will be entitled to services performed by the Federal Government with the Federal finance; on its part, it will accept the Fundamental Law in its entirety or in part, and be subject to such taxation as may be agreed upon. It is impossible to lay down detailed provisions; each case will have to be considered by itself and an individual settlement, political and fiscal arrived at, a settlement which shall not be subject to alteration except with the consent of both parties.

If allowed to develop in this manner, the Federation will consist partly of Province-members all governed by one Fundamental law and partly of State members, each governed by a separate treaty and a settlement. The resulting heterogeneity need not be disconcerting; history has known many heterogeneous federations which have worked fairly well. The United States long consisted of regular States and Territories and still includes Alaska, a Territory of the Incorporated type and Hawaii, a Territory of the Unincorporated type, while Porto Rico has a status of its own. The German Empire founded in 1871, comprised four Kingdoms, six Grand-duchies, five Duchies, seven Principalities and three Free cities and the Imperial domain of Alsace-Lorraine, all united in a great "Corporation of public law." Legally, sovereignty resided not in the German Emperor but "in the union of German federal princes and the Free cities." As the great German jurist Laband put it, "the body of German sovereigns together with the

Heterogeneity.

senates of the three Free cities considered as a unit, is the repository of Imperial sovereignty." Bavaria enjoyed a special position, reserving an amount of independence much greater than was retained by other states, in the management of her army, her railways, her posts and her telegraphs. Saxony and Württemberg also maintained separate military administrations, but the others parted with their military prerogatives in favour of Prussia. In certain matters there subsisted a sort of partnership between the Empire and Saxony, Sare-Attenberg, the two Mecklenburgs, Brunswick and Baden, though the principle of Imperial control was admitted. It was laid down that privileges expressly guaranteed to the states could not be withdrawn without their consent. Here was heterogeneity enough; yet it was found possible to have common Imperial laws on Marriage, Divorce, Settlement, Poor-Relief, Insurance, Veterinary regulations, Weights and Measures. The Empire prescribed, and the Chancellor superintended, the manner of the execution of Imperial laws by the States.

In the case of India, as in that of Germany, history has set limits to uniformity. Within those bounds an effort has to be made to evolve a common political system. Once within the Federation, a state will unconsciously, if not consciously, approach the general standard of rights, duties, and institutions. The instruments of science, the economic forces and the irresistible march of ideas may be relied on, in India as everywhere else, to diminish the heterogeneity and evolve homogeneity. Nothing can prevent the state governments from changing along modern lines—the process has already commenced—and, once their internal political institutions are remodelled, they will feel an irresistible attraction

towards the Federation. It is desirable to provide for their voluntary admission and to frame the Federal scheme on such lines of provincial autonomy as may, from the start, receive their confidence and accord with the spirit of the independence which will, in any case, have to be conceded to them. A Unitary Government of India will fall short of the requirements of the situation. Its concentrated authority will frighten away the States. If any of the latter entered the Federation on guarantee of autonomy, the unitary government, accustomed to rule the provinces in all matters, may not readily adapt itself to the new situation. On the other hand, if the principle of the Federal and Provincial governments being independent in their own spheres and thus being co-ordinate to each other, instead of one being subordinate to the other, is conceded, it will easily be extended to cover the case of any States.

A federation depending on a voluntary basis may not be completed for long. In the meanwhile there must be some organisation to facilitate consultation, co-operation and co-ordination between the states and the rest of the country. Such a body should not interfere with the autonomy of the Federation, the States or the Provinces; it should be neither legislative nor executive; its resolutions should not be legally binding on any government or administration; its whole basis should be voluntary; its whole character consultative and advisory. It need excite no misgivings in any quarter; it need not hurt the pride of anybody. This conference would be organised somewhat on the principle that underlies the Imperial Conference. It should be presided over by the King-Emperor's representative, the Governor-General. It should consist of delegates of governments,

The Conference of States and Provinces.

not of peoples as such. It is suggested that the big states—like Hyderabad, Mysore, Baroda, Kashmir, Travancore, Gwalior—should send two representatives apiece; the next group of states—like Indore, Rewa, Jaipur, Jodhpur, Alwar, Bikaner, Patiala, Udaipur—should send one representative apiece; the others should be placed in groups, each sending one representative. Similarly, each of the larger provinces should send two representatives; each of the smaller ones, one representative. The Federal Government should be entitled to seven or eight seats. So far as possible, the representatives should be ministers, able to speak authoritatively on behalf of their governments. The association of the Federal as well as the Provincial Governments is desirable because the topics to be discussed will be both federal and provincial and neither the federation nor the provinces will be able singly to offer suggestions on them all. The range of discussion should be as wide as possible, covering everything that is common to any state and any part of the Federation. For instance, railways, roads, telegraphs, post, customs, extradition, labour legislation, technical instruction, irrigation, excise, salt, opium and other monopolies—all these can be discussed. The conference should meet every year and should be authorised to appoint committees to thresh out any problems. It should have a regular secretariat, recruited from the civil services of the Federation, the provinces and the States and presided over by a Federal Permanent Secretary.

The experience of International gatherings, of the Imperial conference, of old Australian and Canadian organisations proves that advisory bodies of this character can go a long way to remove misunderstandings, to open fresh avenues of co-operation and to bring the

respective administrations into line. The very fact of such association exercises a great influence on every government and predisposes it to meet others half-way. At the conference of states and provinces the ministers can usefully compare notes and think out policies.

A scheme of co-operation between the States and the Federated provinces is bound to be complicated and give rise to numerous conventions. But one thing is clear from history, treaties and all principles of political action, *viz.*, that the Government of India must be unquestionably responsible for the foreign policy, defence and peace of the country. This is a duty which can never be abdicated or shirked. For the states and the provinces alike, the Government of India must perform it and must assume the powers incidental to it. There is a Peace of India, as distinct from the peace of a province or a state, and that Peace must be preserved by the Government of India with all the forces at its disposal.[1]

[1] *Cf.* the ruling of the Supreme Court of the United States to the effect that just as there is a peace of a state so there is a peace of the United States to be maintained by the Union Government.

CHAPTER V

THE FEDERAL LEGISLATURE

The vast majority of self-governing countries have bicameral legislatures. With the exception of Finland, Esthonia, Bulgaria, Jugo-Slavia, Latvia, Lithuania and Turkey, every European country which has a responsible form of government has joined an Upper to a Lower House. So far as the new world is concerned, Costa Rica, Honduras, Salvador and San Domingo in Latin America, have single-chambered legislatures, but the other and really more important states have adopted the bicameral pattern. In the Polish Constituent Assembly which met in 1919-20, the party of the left did not want a second chamber at all; the socialists would substitute a chamber of Labour "to represent and protect the interests of all labouring citizens of the Republic," but ultimately it was decided to set up a Senate. In France, the Radicals for twenty-five years demanded the abolition of the Senate, but reconciled themselves to it when they captured it. In Switzerland, some years ago, a proposal to abolish the Council of States (the second chamber) was rejected by the National Council by 64 votes to 7. In Northern Ireland the Socialists and the Nationalists disapprove of the principle of the second chamber, but the other parties are wedded to it. In several other countries such as England and Canada, there is deep dissatisfaction with the existing second chambers and

The Bicameral Legislature.

numerous projects of reform are discussed, but one meets with singularly few demands for their downright abolition.

Its Justification.

The general practice has made the bicameral system almost a dogma from which it is heresy to depart in theory or in practice. It has been justified by philosophers and statesmen on grounds of supreme political utility. As early as the seventeenth century, Harrington envisaged a two-chambered legislature in the Utopia of the Oceania. In his classic exposition of 'Representative Government,' John Stuart Mill declared that " a majority in a single assembly, when it has assumed a permanent character—when composed of the same persons habitually acting together, and always assured of victory in their own House—easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority. The same reason which induced the Romans to have two consuls makes it desirable that there should be two chambers; that neither of them may be exposed to the corrupting influence of undivided power even for the space of a single year."[1] Burgess bases the justification on legislative necessity. In the interests of sound legislation, you must find out what the reason of the people, the common consciousness, demands as distinct from what the will of the people commands. The legislature must be so constructed as best to fulfil this purpose. Now, "the interpretation of the common consciousness is a far more difficult matter than the registry of the popular will. It requires reasoning, the balancing of opinions and interests, the classification of facts, and the generalisation of principles. A single body of men is always

[1] Mill, *Representative Government*, revised edition.

in danger of adopting hasty and one-sided views, of accepting facts upon insufficient tests, of being satisfied with incomplete generalizations, and of mistaking happy phrases for sound principles." Two chambers, it is concluded, will secure the happy mean between progress and conservatism.[1] A healthy check, a necessary balance, imperative revision and amendment of bills, a counterpoise to radical hurry, 'an appeal from Philip drunk to Philip sober,' are the other justifications generally adduced for the bicameral system. Walter Bagehot, a firm believer in the theory of checks and balances, bases the case for a second chamber on the imperfections of the popular chamber. "With a perfect Lower House it is certain that the Upper House would be scarcely of any value. If we had an ideal House of Commons perfectly representing the nation, always moderate, never passionate, abounding in hours of leisure, never omitting the slow and steady forms necessary for good consideration, it is certain that we should not need a higher chamber. But though beside an ideal House of Commons, the Lords would be necessary and therefore pernicious, beside the actual House a revising and leisured legislature is extremely useful, if not quite necessary." An American tradition reports Washington as remarking to Jefferson on the tea-table that "the Senate is to be the saucer into which the bills that come steaming hot from the House are to be poured for cooling."

Yet the fact remains that no such ideas were responsible for the origin of the system. "It is commonly assumed that a single-chamber parliament must be a kind of constitu-

Doubts.

[1] Burgess, *Political Science and Constitutional Law*, II, pp. 106-107.

tional monstrosity. This, I suppose, is due, in part, to the fact that almost every progressive community, in adopting representative institutions, has imitated the system which grew up in Great Britain. Yet this system of two Houses, of an 'aristocratic and a popular' division of the law-making apparatus is the result of a series of accidents. There is nothing in the nature of things, which prescribes that a Parliament should be divided into two compartments, and not more than two. There was a stage in our history when we had only one Great Council of the Realm, and the arrangement might well have persisted. There was another stage when it seemed likely that there would be three chambers—a chamber of the burgesses or commons, a chamber of the gentry or knights, and a chamber of the greater barons or nobles—with a separate house for the clergy, and perhaps another for the merchants and traders. And if that had been the course of evolution, no doubt eminent jurists and political philosophers would have been prepared to show that the true adjustment of 'checks and balances,' the happy medium of democratic license and ordered freedom, could not possibly have been maintained without the conjoint existence of three chambers, or four, or possibly five. It is true that in Great Britain, from the time of the Tudors to the end of Queen Victoria's reign, the dual arrangement was successful, and indeed essential; but whether it is equally necessary in the future may be open to question."[1]

There were assemblies of three or four chambers in the Middle Ages because the representation or gather-

[1] Sidney Low, *The Governance of England*, Intro., pp. xiv-x

ing went by estates, that is, orders in society. England developed an assembly of two chambers because, for political purposes, the nation came to consist of two sets of orders. Since constitutional government has been copied from England by the rest of the world, the two-chamber system was reproduced in other countries. It is primarily the force of English example, the universal respect for the Mother of Parliaments, which is responsible for the vogue of the bicameral system. A second chamber is now a matter of habit. Secondly, it has been turned to serve other purposes. In a federation, while the lower chamber may represent the people at large, the upper may represent the states or provinces in a manner so as to enshrine and guarantee state rights. Next, the upper chamber may also perform some revisory functions, interpose a suspensory veto, call for a Referendum or a General Election. These functions, it is clear, can be discharged only if the second chamber really differs from the lower, and is, with a view to that end, constructed on somewhat different principles. It is at this point that the central difficulty appears. If the people are sovereign and the lower chamber represents them fully, who can resist the popular house? The people, if they like, may impose restrictions on their chamber, but will they long submit to the veto of a class? Yet if the Upper Chamber is made to represent not a class but the people, will it not be a mere replica of the lower? The dilemma was neatly put by the French constitution-monger, the Abbé Sieyes, in an oft-quoted passage. "Of what use will a second chamber be? If it agrees with the Representative House, it will be superfluous; if it disagrees, mischievous." On the basis of this dilemma a modern Labour leader in England

Origin of the System.

Mr. Philip Snowden, thus states his opposition to the very principle of an Upper House. "The Labour Party is opposed to a second chamber, no matter how such chamber may be constituted. It bases its opposition in the first place, on the broad ground that one Legislative Chamber, elected on a democratic franchise, and by such electoral methods as will ensure, as far as possible, a representation of the popular will, is the best means of promoting legislation in harmony with the desires of the majority of the nation, and that a second chamber can, in such circumstances, only serve one of two purposes—namely, if it also be elected in such a way as to represent a popular will it is a superfluous ornament; and if it be composed of men nominated or elected on a different franchise, it cannot be representative of national opinion, and is, therefore, a negation of popular government." Similarly, an early writer, Prof. Hearn, stated in his 'Government of England' that "if there be two representative chambers and if one be formed on sound principles the second, so far as it differs from the first, must deviate from those principles."[1] Benjamin Franklin compared a bicameral legislature to a cart with a horse hitched to each end and both pulling in opposite directions. Prof. Morgan points out that a legislature is now controlled by the cabinet and does not imperatively require a check from another chamber. A strong Upper House, he goes on to say, means either a weak or a subservient executive.[2]

The fact is that if the democratic principle is only partly admitted and imperfectly implied, it is easy to have a second chamber based on non-democratic prin-

[1] Hearn, *Government of England*, p. 543.

[2] Morgan, *Place of a Second Chamber in the Constitution* pp. 9-10, 14-15.

ciples alongside the democratic Lower House but once the democratic principle is recognised as supreme, it passes the wit of man, as Goldwin Smith said, to devise a satisfactory second chamber. In a democracy, all idea of using a second chamber as an insurmountable veto on the Lower House has to be given up but it must be admitted that a second chamber is desirable for the Indian Federal Government, as distinct from Provincial Governments for two reasons. In the first place, the Federation will deal with some very important, delicate and complicated matters which can profitably be discussed in two places and in regard to which the legislation of one chamber may usefully be revised by the other. In the second place, a Federation can enshrine the regional principle in a second chamber and give a weightage to the smaller provinces. Before formulating the plan of a second chamber in India it is desirable to review and evaluate the various devices which the modern world has tried.

A distinction may be drawn between unitary and federal states. In the latter, the second chamber may be made to represent the confederate states or provinces, and thus be based on a principle which, without being necessarily undemocratic, is different from the principle of the lower chamber. But the central difficulty reappears at the next stage. How are the provinces to elect the senators? It may be granted that the smaller provinces should send as many senators as the bigger ones, or, at any rate, a larger number than their population alone would entitle them to, but by what precise method are these representatives to be selected? In unitary countries the difficulty is infinitely greater; apart from methods, the very basis is hard to discover. In the

Federal Senates.

present-day constitutions, the second chamber devices of federal and unitary states partly overlap and indicate that some of the difficulties are common to all.

United States.

In the United States, the senators were chosen, two each, by the legislatures of the states. The Senate has, by common consent, proved one of the most successful institutions in the country. The grant of equal representation under the "Connecticut Compromise" originally suggested by Benjamin Franklin, reconciled the smaller states to the Union. It was believed by many that election from the state legislatures was responsible for the high standards that, on the whole, the Senate maintained. John Stuart Mill said that "the case in which election by two stages answers well in practice is when the electors are not chosen as electors, but have other important functions to discharge, which precludes their being selected solely as delegates to give a particular vote. This combination of circumstances exemplifies itself in . . . the senate of the United States." But the system led inevitably to two political evils of the first magnitude. "It brought national politics" says Bryce, "into these bodies (the state legislatures), dividing them on partisan lines which had little or nothing to do with state issues. It produced bitter and often long-protracted struggles in the legislatures over a senatorial election, so that many months might pass before a choice could be made. It led to the bribery of legislators by wealthy candidates or by the great incorporated companies which desired to have in the senate supporters sure to defend these interests."[1] As the same writer had noted earlier, "Every vote in the senate was so important to the great

[1] Bryce, *Modern Democracies*, II, p. 64.

parties that they were forced to struggle for ascendancy in each of the state legislatures." Under this system, the state legislatures were chosen partly on national issues, and thus the true interests of the state were sacrificed at the start. Next, the legislators were nominated by managers of national parties and divided into hostile camps on matters which did not directly concern the state. Thirdly, the electorate was so small as to be easily corruptible. Occasionally rich men practically bought their election as, for instance, in 1912 when a newly elected senator had to be expelled for bribery.[1] Lastly, the excitement over these elections proved too disconcerting. The state legislatures "often got so hot over a senatorial election at the beginning of their session that for weeks thereafter they could not cool down to the prosaic work of making the state laws."[2] These defects were patent by the middle of the nineteenth century and various devices were adopted to meet them. In 1913, the seventeenth amendment to the constitution transferred the election from the state legislatures directly to the registered voters of the states. The differences between the electoral methods for the two Federal Houses are that senatorial constituencies (which cannot be more than two in a state) are much larger than the constituencies for the House of Representatives, that the age limits for the voters and candidates are higher, and that the senators are chosen for six, instead of two, years. The basis is democratic in both cases. American experience is conclusive on two points, firstly, the interests of the state or province demand that its legislature should never form a consti-

[1] Bryce, *American Commonwealth*, I, pp. 100-101. See also Lowell, *Public Opinion and Popular Government*, p. 133.

[2] Munro, *Government of the United States*, p. 190.

tuency for federal elections, and secondly that in the interests of political morality, a constituency should never be too small. Indirect election in fact means that if either federal or provincial politics are corrupt, the other should also be contaminated. Positively, it suggests that a longer legislative term, retirement by rotation, and higher age qualifications for voters and candidates are useful minor devices of differentiation between the two chambers. But direct election has put the senate under the sway of the same parties which control the House of Representatives and has thus largely obliterated the difference of principle. The American Senate has, however, one advantage which cannot be shared by any Indian Upper House that is feasible. The former attracts a better and more experienced type of public man, because besides its longer term, it is co-ordinate to the lower house, and in addition, enjoys a share in federal appointments, and powerfully influences foreign policy through its constitutional prerogative of sanctioning treaties by a two-thirds majority. Co-ordination is possible though not free from difficulties in the United States because the Presidential Executive, directly elected by the people, is not responsible to either chamber. The practice would not work in a parliamentary system, for no executive can be responsible to two co-ordinate bodies. Here American experience only proves that a Presidential Government is compatible with co-ordinate houses, but its day-to-day working also suggests that a parliamentary government might break down under it. At any rate, it is significant that parliamentary executives generally rest on a system which recognises one of the houses to be the centre of gravity.

The Senate of the Canadian Federation was, like that of the United States, designed to safeguard the status and

interests of the provinces, but the members are appointed by the executive for life in certain proportions from the provinces. As a result, the life-members have tended to lose touch with the ever-changing currents of national life, and as vacancies occur, the party in power tries to pack the senate with its own followers. As a 'pocket borough' of the party executives, the Senate is "the one conspicuous failure of the Canadian Constitution." In Canada, the House of Commons makes and unmakes the Governments, and always has the last word on money bills. But otherwise the prerogatives of the Senate are equal to those of the lower chamber. As a result, the Senate has precipitated numerous dead-locks, delayed or stopped urgent reforms and caused an immense waste of time and energy. Its reorganisation is one of the outstanding problems of Canadian politics. Its experience of the last sixty years proves that life-tenure and nomination are unsafe bases of an upper chamber and that even partially co-ordinate houses do not accord well with a parliamentary executive.

Canada.

In Australia, the senators (36 in number) are elected directly by the people, in certain proportions from each state, no original state having less than five seats. The term is six years, one-half of the members retiring every three years. The elections are now controlled entirely by the party machines. As a result, the Senate is no longer the protector of the rights or interests of the states.[1] It is a party chamber exactly similar to the lower house in principle. Here is the supreme danger of direct popular

Australia.

[1] See Sir John Quick, *The Legislative Powers of the Commonwealth and the States of Australia* for the original purpose of the senate; also, Moore, *Commonwealth of Australia.*

election. It tends to render the upper and lower chambers too homogeneous, or if the term of the former is much longer, it makes it possible for the two chambers to be dominated by antagonistic parties. The Houses being partly co-ordinated in authority in Australia, deadlocks and crises and single or double dissolutions follow. Australian experience demonstrates that direct election is not free from danger since it reproduces party-regime in either place and that co-ordinate houses are only a contrivance to generate friction.

The Argentine.

In the Argentine Republic, the Senate—consisting of 28 members—is chosen by provincial legislatures for nine years. Here too the scheme cannot be regarded a success.

Mexico.

In Mexico the Senate is now elected directly by the people in various states and federal districts.[1] The term is four years, half being renewed every two years.[2]

Switzerland.

In Switzerland the Council of States as the Upper House is called, consists of two representatives from each canton, and one from each half-canton. As a means of reconciling cantonal and federal loyalties, it has, like the American Senate, been an undoubted success. The selection of the members is left entirely to the cantons which have adopted very divergent methods. They are elected for *one*, *two*, *three* or *four* years by the people or by direct assemblies or by cantonal legislatures. The system has worked well, but the social, economic and political conditions are so unique in Switzerland that the practice, like so many other Swiss institutions, cannot be reproduced elsewhere. The only lesson of Swiss experience

[1] *The Constitution of Mexico*, § 56.

[2] *Ibid.*, Article § 58.

is that in a federation the provincial basis is helpful for the constitution of the Upper Chamber.

The German Empire.

The old German Bundesrat consisting of representatives of the state governments was a curious amalgam; it was partly a congress of ambassadors, partly a legislative chamber, partly an executive body. Here the representatives of each state had to cast their votes *en bloc* at the instruction of the state. The Bundesrat can offer only one suggestion to India, *viz.*, that the Provinces can serve as a principle for the composition of the second chamber.

The German Republic.

The present German Republic, like its predecessor, admits the state basis for the upper chamber, the Reichsrat, and vests the selection of the members not in the people but in the state governments with one partial exception in the case of Prussia whose vote, lest it should be too homogeneous and therefore preponderant, has been split up between her executive and the provincial legislatures. Art. 61 lays down that each state shall have at least one vote in the Reichsrat, that the larger states shall have one vote for each million of inhabitants and that (in view of the huge size of Prussia) no state shall have more than $\frac{2}{3}$ths of the members. Art. 63 specifies that the states should be represented by members of their ministries. The numbers of the Reichsrat are simply agents of the state governments, appointed, recalled and instructed by them at any time. It must be admitted that the method has worked well and deserves serious consideration. It provides representation to state interests and furnishes for the Upper Chamber a basis remarkably different from that of the Lower Chamber elected on universal suffrage. It solves the central difficulty of the Upper Chamber

problem in a masterly fashion, but it destroys the homogeneity and continuity of the Upper Chamber, renders it almost incapable of united action and gives undue weight to state governments in Federal Counsels. If it has proved satisfactory in Germany, it is partly because the new Republic displays a pronounced unitarian tendency. Nevertheless, the plan has great merit and may have a future. If the Indian Constitution is to be unitary and not federal, as proposed in the foregoing chapter, the German plan has a great deal to recommend itself. It follows that under such a system, the Upper House must be definitely subordinate to the Lower, lest the provinces dominate the central government.

Austria.

The new Austrian Constitution, Article 24, vests the election of the second chamber, the Bundesrat in the Provincial Landtags, but Austria is not a real federation.

Prussia.

The old Prussian Herrenhaus, partly hereditary, partly nominated and partly elective, was found palpably unsuited to modern conditions and swept away by the Revolution of 1918. After her segmentation in 1919, Prussia adopted the plan of having her second chamber, the Staatsrat, elected by provincial diets. The Constitution, Art. 32 (2), provides that for every 500,000 inhabitants a province shall be entitled to one representative, but each province shall have at least three representatives in the Staatsrat. A fraction of more than 250,000 inhabitants shall be counted as equal to 500,000 inhabitants. Here the distribution of seats is interesting but it is yet to be seen how election by the provincial diets reacts on the latter's position. Prussia, however, is so little of a federation, the powers of the provinces are still so vague, that it can furnish hardly any conclusions for true federations.

Passing to Unitary States, we find that in the absence of the state-basis, all sorts of contrivances have been tried. The House of Lords in England, predominantly hereditary, is completely out of tune with the spirit of the age, and in spite of its traditions of nine centuries and a certain amount of deserved reverence, has been shorn of its effective prerogatives, and after the Parliament Act of 1911, left with only a suspensory veto on legislation, with no control over finance. Several attempts have been made and many projects formulated for its reconstitution. Nothing has so far been done, but all agree that the hereditary basis should either be done away with or should be substantially modified. The preamble to the Parliament Act, 1911, declared that a second chamber would be "constituted on a popular instead of hereditary basis." In India, in any case, the hereditary basis is completely out of the question.

England.

The Upper Chamber in pre-war Hungary was predominantly hereditary, but it has since been largely remodelled. Under the Law of November 11, 1926, the Hungarian second chamber, a very composite assembly, consists of thirty representatives of the various churches, forty representatives of functional and scientific associations, about fifty elected by the county councils and municipalities, about thirty-eight elected by the old Table of Magnates from among themselves, a number of high officials and life-nominees—altogether about 400.[1] The Spanish Senate similarly, though in different proportions, represents the church, officials, nobles, professional and academic bodies, local institutions,

Hungary.

Spain.

[1] Marriott, *Second Chambers* (Revised Edition), pp. 155-56.

larger taxpayers and includes some life-nominees. The Japanese House of Peers consists partly of the nobility, partly of representatives of the highest taxpayers, and partly of persons nominated by the Emperor on the ground of their attainments or services to the state. The Italian Senate is partly hereditary and mostly appointive. None of these bodies can, from the constitutional point of view, be regarded a success. Nomination for life or a term of years has also been tried elsewhere, for instance, in the case of the House of Peers in France under King Louis Philippe or in New South Wales in Australia. Nowhere can the results be said to justify the experiment. The hereditary or ecclesiastical basis is everywhere condemned by democratic opinion and gives rise to acute class-feeling.

Japan.

Italy.

The Czecho-Slovaks, at a loss to find a different basis for the Upper Chamber, were content to enact that the Senate should number only 150, that it should be elected for eight years, and that senators must be at least 45 years of age.

Czecho-Slovakia.

The Portuguese Upper Chamber consists of 71 members, elected by the municipal councils for three years, one-half retiring at a time. Local bodies provide an excellent basis but the danger of their composition, as that of the old American state legislatures, being influenced by extraneous factors remains. If their members could be joined to others to form constituencies, the danger may be diminished.

Portugal.

In Belgium, as Art. 53 of the Constitution prescribes, the Upper Chamber is elected partly through electoral colleges in proportion to the population of each province, partly through pro-

Belgium.

vincial councils in the proportion of one senator to 200,000 inhabitants, partly through co-optation. Candidates must belong to one of the twenty-one classes enumerated, including legislators, aldermen, officers, civil functionaries, graduates, several categories of professions, and members of professional, industrial and labour councils. Here the distribution of seats gives rise to just complaints and, in addition, the unity of the chamber is destroyed.

France.

In France,[1] according to the Law of December 9, 1884, senators are elected by *scrutin de liste* by a college composed of:—

(1) the deputies of the area,
(2) the general councillors who constitute the Departmental Council,
(3) the councillors of each arrondissement (or subordinate division of the Department),
(4) delegates chosen from among the voters of each commune (village or town) by the Communal Council.

The law of 1884 established a gradation according to which communes with a population of 500 or less send one delegate while those which have a population of more than 60,000, send the maximum of 24 delegates. Great inequalities still remain. The Senate is, as Gambetta said, "The Grand Council of the Communes" which, 36,000 in number, send more than five-sixths of the delegates to the Electoral College (Article § 6). The senators are elected for nine years, but retire by rotation so that one-third of the senate is renewed every three years (Article

[1] The Organic Law of December 9, 1884, fixed the number of senators at 300. An additional number of 14 senators is now supplied by Alsace-Lorraine. The Law of 1875 had thrown in a block of 75 life-senators, the last of whom died in 1918.

§ 7). Every senator must be a French citizen, at least 40 years in age, and in the enjoyment of civil and political rights (Art. 4). The French system is a masterstroke, and more than any other system meets the requirements of a difficult situation.

Denmark.

In Denmark under the Constitution of 1849, the Landsting (the Upper House) elected on property qualifications, came into conflict with the lower chamber (the Folketing), which occasionally paralysed the government or led to the suspension of constitutional government. The revision of 1915 has greatly reduced property qualifications. Of 78 members, 59 are now elected by electoral colleges and the rest by the outgoing members according to the principles of proportional representation.

Norway.

The Norwegian plan is strikingly simple and original and has recently found advocates in other countries. Article 73 of the constitution prescribes that the Storthing (the parliament) shall elect from among its members one-fourth of their number who shall constitute the Lagthing; the remaining three-fourths shall form the Odelsthing (the lower house). A two-thirds is the quorum for a meeting of either Thing. According to Article § 76, bills first originate in the Odelsthing and are then sent to the Lagthing, whose proposals thereon must be considered. If, however, the Lagthing rejects a measure of the lower house a second time a joint meeting is held and the majority prevails. Here the second chamber is merely an elected committee of the lower. There are those who doubt whether Norway should be called bicameral at all. But the Norwegian method must be deemed highly meritorious in view of the fact that revision is one of the principal functions of a second chamber and

that it is extremely difficult to discover a satisfactory basis for it in a modern state.

Northern Ireland.

An approach to the Norwegian principle is made in Northern Ireland where the Senate consists, in addition to the Lord Mayors of Belfast and Londonderry, of 24 members elected by the Lower House.

Sweden.

In Sweden the Upper House, of 150 members of over 35 years, is elected partly by the Landstings or the county councils and partly by the electors of Stockholm, and five other large towns on a property qualification for eight years. The members must be over 35 years and number 150, of whom one-eighth retire each year.

The Irish Free State.

The Irish Free State (Constitution § 30 ff) elects the members of the Seanad Eireann (over 35 years of age) from panels, elected on the principle of proportional representation by the Chambers, thrice as numerous as the vacancies to be filled, from among persons proposed on the grounds that they have done honour to the nation by reason of useful service, or that because of special qualifications or attainments, they represent important aspects of the nation's life.

Conclusion.

Modern political experience has been wide and varied enough to warrant a few negative and a few positive conclusions. It seems to be established that a second chamber is difficult to devise in a unitary state, that in a federation, the provincial basis supplies a good starting-point, but that the state legislatures should never form senatorial constituencies; that under all circumstances longer terms and higher age-qualifications may be resorted to; that an hereditary or appointive second chamber is unsuited to any

democratic constitution ; and that the property basis is equally objectionable. The property basis still finds numerous advocates in conservative ranks, but it is not easy to discover a justification for it either in principle or in expediency. The Bryce Committee on the reform of the House of Lords considered and rejected the idea as unsuitable to modern conditions. It confers on property much greater power than it deserves or requires. In the present ordering of associated life, property will in any case command great political power. Landholders, industrial and commercial magnates, inheritors of great wealth, leading lawyers and medical practitioners will always supply a large quota of all elective institutions. In the United States and elsewhere, the money power makes itself felt in all sorts of ways on the polling-booths and inside the legislatures. Everywhere the rich man can nurse a constituency to its greater satisfaction. He can defray the electioneering expenses more easily than a poor man, even when supported by party-funds. An analysis of the returns of the Central and Provincial Legislatures in India in 1920, 1923 and 1926 supports the conclusion. Property will under all circumstances enter the Upper as well as the Lower House. To give it a legal predominance in either chamber is to put a double disadvantage on the non-propertied classes. Besides, if the house of property-holders rejects any measures, wise or unwise, sent up from the lower chamber, it will tend to provoke a conflict of classes. A simple dispute between the two houses, which a little negotiation may settle amicably, will assume the proportions of a bitter struggle and in the end react unfavourably on the general position of property itself. In the face of these prospects, a second chamber may either abdicate its proper functions and destroy its utili-

ty, or it may plunge the country into a fierce struggle of the 'Haves' and the 'Have Nots.' Nor is education as such a desirable basis for the composition of the Second Chamber. The educated class, after all, is only part of a class—the middle class, and its statutory ascendancy will be open to all the objections which may be urged against that of any other class. Besides, educated men will, in any case, come to the front and should require no weightage.[1] Ability stultifies itself the moment it seeks to entrench itself behind artificial barricades. As the sequel will show, the communal or professional basis is not only defective in principle, but bristles with insurmountable difficulties in the case of a chamber which is to wield power as distinct from influence. What communities and professions shall be represented and how shall seats be allotted among them? No satisfactory solution is possible.

The methods which experience commands are three in number—the French principle of election from electoral colleges; the German principle of appointment by provincial governments; the Norwegian

[1] On the whole subject of the Second Chamber, see particularly, Temperley, *Senates and Upper Chambers*; Lees-Smith, *Second Chambers in Theory and Practice*; Marriott, *Second Chambers*; *Select Constitutions of the World*; Bryce, *Modern Democracies*; Munro, *Governments of Europe*; Rogers and McBain, *New Constitutions of Europe*; Newton, *Federal and Unitary Constitutions*; Lowell, *Governments and Parties in Continental Europe*; Keith, *Responsible Government in the Dominions*; Ogg, *Governments of Europe*; Lecky, *Democracy and Liberty*, I, pp. 299 ff. John Adams, *Defence of the Constitution of Government of the United States, 1787-88*, has a strong plea for a second chamber.

plan of selecting a committee out of the legislature to act as a revising body. It is difficult to think of any other plan which will answer the needs of the situation. One of the three alternatives has to be selected, and, of course, modified to fit into Indian conditions. The Norwegian plan may be rejected, since it does not take account of the provincial basis which is desirable in a true federation, as well as in a state which devolves large powers on provinces. It can accord only with strict unitarism. The German plan is certainly attractive, but it may mean undue influence of provincial governments in the direction of a federation which is based, for the most part, on the principle of co-ordinate national and provincial jurisdiction. In Imperial Germany, it raised the Executives to an undue predominance. In Republican Germany it may prove more successful, partly because the constitution inclines strongly in favour of unitarism. If India were to have a unitary constitution, the German plan may be worth a trial as redressing the balance on the provincial side. But under the scheme unfolded in these pages, it will give the provincial governments great power in spheres with which they should have nothing to do. So we are left with the collegiate plan and the provincial basis. It should be pointed out that in France the collegiate plan has by no means proved perfect. A recent American writer notes that "the work of the electoral colleges in France reminds one of the nominating conventions in America; there is the same attempt on the part of the political leaders to manipulate the proceedings in advance, the same manœuvring and forming of combinations, the same frequent triumph of dark horses over strong men. There is the same lavish outpouring of promises and usually the same rumours of corruption

float through the air."[1] Frenchmen themselves admit the force of such criticism but the evil seems to be traceable mainly to the small size and predetermined composition of the college. An effort should be made to eliminate these sources of corruption. It is necessary to determine firstly the allotment of seats to the various provinces, and, secondly, the composition of the electoral college.

Distribution of Seats.

Provincial loyalty is not strong in India today, as State feeling was in the United States, Switzerland, Germany, Canada and Australia when federations were set up. Here is no question of provinces surrendering existing independence to a newly set-up federation. The change, in fact, is the other way round. Hence it is not necessary to perpetrate such flagrant inequalities as the United States or Switzerland had to allow. Nevada (admitted in 1864) with a population of 81,875, in 1910 had the same senatorial representation as New York with 9,113,614 inhabitants in the same year. In Switzerland the canton of Bern with 2,600 square miles and 640,000 inhabitants has the same representation as a far smaller canton with an area of 61 square miles and 14,000 inhabitants. To the Brazilian Senate until 1889, each province elected from 2 to 6 members according to population. After the establishment of the Republic in 1889 every state, large or small, sends three members to the senate, which, however, acts as a revising chamber rather than as a guardian of state rights. In Imperial Germany, too, every state, howsoever small, had at least one vote in the Bundesrat.

[1] Munro, *Governments of Europe*, p. 637.

In India the provincial basis should be recognised by giving the smaller provinces a weightage, but in view of the immense differences of area and population among the existing provinces and the number and dissimilarities of prospective state-members, absolute equality would be unfair.

The Plan.

It is necessary to determine a maximum and a minimum and to lay down a rule for settling the actual number in intermediate cases. A careful comparison of the latest census figures suggests that in order to have a senate neither too large nor too small and at the same time harmonising the principles of region and population, twenty-five should be the maximum quota and that it should be allotted to all provinces with a population of twenty millions or more. At the lowest calculation, this gives one senator for every 800,000 inhabitants. This ratio may be applied to determine the number of seats for other provinces, subject to the minimum of five for every province with a population of two millions or more, a fraction of more than 400,000 counting as equal to 800,000. Provinces with a population of between two millions and one million should be entitled to two seats, while those with a population below one million but more than 400,000 be given one seat. Provinces with a population of less than 400,000 should as a rule combine with neighbouring territory to form constituencies. Coorg has a population of less than 200,000 but as an original member of the federation it should be given one seat.

As the provinces are constituted at present, the scheme would, according to the census of 1921, work out as follows :—

	Provinces.	Population (1921).	Seats in the Senate.
1.	Bengal	46,695,536	25
2.	The United Provinces	45,375,787	25
3.	Madras (Presidency) ..	42,318,985	25
4.	Bihar and Orissa	34,002,189	25
5.	The Punjab	20,685,024	25
6.	Bombay (Presidency) ...	19,348,219	25
7.	The Central Provinces and Berar.	13,912,760	17
8.	Burma	13,169,099	16
9.	Assam	7,606,230	10
10.	The N.-W.F. Provinces ...	2,251,340	3
11.	Ajmer-Marwara	495,271	1
12.	Delhi	488,188	1
13.	British Baluchistan ...	420,648	1
14.	Coorg	163,838	1
	Total ...		199

It may be permitted to state that the scheme is not so arbitrary as it may look at first sight. The Federal principle demands that the smaller provinces be given more seats than their numerical strength alone would warrant but equal representation is impossible in face of the huge differences of population. In view of the figures several rules have to be devised. The seats shall be

redistributed after every decennial census but the principles laid down above shall hold even after any redistribution of provinces that is feasible. If and when the Indian States join the Federation as component members, the same rules may be applied to them. Their quotas would work out somewhat, though not exactly, as follows :—

States.	Population (1921).	Seats in the Senate.
1. Hyderabad	12,471,770	16
2. Rajputana Agency ...	9,844,334	15
Bikaner	659,685	1
Udaipur	1,380,063	2
Jodhpur	1,841,642	2
Jaipur	2,338,802	3
Alwar	701,154	1
Kotah	630,060	1
Other States	2,289,372	5
3. Bombay States	7,409,429	18
4. C. I. Agency	5,997,023	10
Indore	1,151,578	1
Bhopal	692,448	1
Rewa	1,401,672	2
Other States	2,751,325	6
5. Mysore	5,978,892	7

	States.	Population (1921).	Seats in Senate.
6.	Madras States	5,460,312	
	Travancore	4,006,062	5
	Cochin	979,019	1
	Other States	475,231	1
7.	The Punjab States ...	4,416,036	5
	Bhawalpur	781,191	1
	Patiala	1,499,739	2
	Other States	2,135,106	5
8.	Bihar & Orissa States ...	3,959,669	9
9.	Kashmir	3,320,518	4
10.	Gwalior	3,185,075	4
11.	Baroda	2,126,522	3
12.	C. P. States	2,066,900	5
13.	N.-W. F. States	1,622,094	4
14.	U. P. States	1,134,881	2
15.	Bengal	896,926	1
	Cooch Behar	592,989	1
	Other States*	304,437	...
16.	Assam States*	384,016	...
17.	Baluchistan States* ...	378,877	...
18.	Sikkim*	81,721	...
	Total ...		113

* To be joined with other territory.

A complete scheme would require that the states called after various provinces or agencies, grouped together in the table above, should be dealt with individually on the recognised principles. The result may be a slight increase in the number of states representatives in the Senate. The number will be somewhere in the neighbourhood of 120. It will be observed that the states obtain roughly 113 out of a total of 312 seats, that is slightly more than 36 per cent, while their population is only slightly above 22 per cent. But such is the inevitable result of the application of federal principles everywhere in the world.

A scheme such as this will meet all future contingencies, give a weightage to the smaller units, and, unless the population of the country shows an enormous increase, keep the number of the senate below 350, while so far as the immediate future is concerned the Senate will number only about 200.

The Electoral College.

Every province should, as a rule, be divided into as many constituencies as the number of seats to which it is entitled. Every constituency should comprise the following:—

1. The members representing the area of the constituency in the lower Federal House.
2. The members representing the same in the Provincial Legislative Council.
3. The members of the District, Municipal and Taluka boards in the same area.
4. One representative to be elected by the primary of every village comprising five thousand inhabitants or more or the com-

bined primaries of neighbouring small villages comprising altogether, at least, five thousand inhabitants.

The last class will easily preponderate in the College; hence there will not be much inducement to political parties to pack the legislatures and local boards with their nominees. Besides, with a longer term of the senate, it is only alternate legislatures or boards whose members will be called upon to participate in the electoral college. It is inadvisable to call the heads of village organisations as such to the electoral colleges, because, they will constitute the greatest number, and an effort might be made to pack the offices in the party interest every sixth year or so. Nor is it possible to confine the membership of colleges to the members of the other duly elected local authorities. It would be open to the same objection as election from the Provincial Legislature. For England, the Bryce Committee rejected the proposal of election by local bodies on the ground that it was likely to introduce national party-politics into those bodies. The Senate will thus be predominantly representative of the rural population who constitute the vast majority and the backbone of the country. It is likely that the representatives of villagers will be men prominent in their village organisations, men who have had some experience in village administration. While it is impossible to dogmatise, the chances are that the electoral college will mostly comprise men of some administrative experience, and will not easily be swayed by claptrap. It may be added that the candidates for election should be at least thirty years of age. If it is proposed to reserve seats for minorities, the end can be achieved by grouping together three or four electoral colleges,

and laying down that one of the representatives must come from the minority community.

It is suggested that the second chamber should be renewed by rotation. The term should be six years, one-sixth should retire every year. During the first five years, lots should be drawn for retirement. Thereafter the machine would work automatically. Rotation would not only give the Chamber a basis different from that of the lower house, but it would keep it in touch with public opinion, and effectively maintain its continuity of tradition.

Rotation.

Such a House will differ in its basis from that of the Lower Chamber and yet will not violate the democratic principle. It will, in a measure, represent regions and the provincial principle, while the lower house will represent numbers and the national principle. Deriving its power from popularly elected colleges, the Senate will command prestige and be able to make itself felt. But it is impossible to make the second chamber co-ordinate to the Lower, if we are to have a parliamentary as distinct from the presidential executive. No ministry can serve two masters. In France, Italy and a few other lands where the Upper Chamber comes at certain points between the ministry and its responsibility to the Lower Chamber, the result is either a weak government or endless confusion. On the other hand the Senate in Holland and the Lagthing in Norway have legally as well as practically few powers and have worked well. Profiting by experience, the founders of the new constitutions in Europe have made the Second Chambers definitely secondary. Australian and Canadian experience

Relations of the Two Houses.

also demonstrates that Parliamentary Government is not wholly compatible with co-ordinate Houses of the Legislature. If the ministry is to be responsible to the Lower Chamber, the latter must control supplies and appropriations. As usual in the bicameral system, money-bills should originate in the Lower Chamber. The Upper House may propose amendments, but they may or not be accepted by the Assembly whose opinion shall prevail. The French statesman Gambetta was willing to concede to the Senate "the right of making remonstrances to the chamber, to point out that this or that tax, this or that credit or suppression of credit, is unjust or inopportune, and to suggest a modification of the whole Budget. But the right of the senate ends there. The Chamber of Deputies must have the last word, and its decision must be final."

In regard to other bills, which may originate in either chamber, differences may be adjusted by joint conferences and committees. Failing that, some method should be devised to secure necessary legislation. The practice of dropping measures in case of irreconcilable difference between the two chambers, which obtains in the United States, Canada, France, and elsewhere, is occasionally very injurious to the interests of the State. It may lead to the abandonment of some essential measures. It is expected that "Either house would yield were it unmistakably condemned by public opinion."[1] But that seems to leave too much to chance. In France also "the doctrine of the last word" requires the senate to give way when the chamber has acted upon the budget a second time. In other matters, however, there are enormous delays. A weekly-rest bill

1 Bryce, *American Commonwealth*, I, p. 188.

which passed the Chamber in March, 1902, was not disposed of by the Senate till July, 1906. An income-tax bill adopted by the Chamber in March, 1909, was not reported from the appropriate committee of the Senate till more than four years had elapsed. Secret voting was similarly delayed for nine years, that is until 1913. On the other hand, the Chamber, with its sense of responsibility diminished, sometimes plays to the gallery or to the whims of a party and indulges in extravagant proposals in the full expectation that they would be vetoed by the Senate. There must be some way out of the dead-lock. The referendum is not yet suitable to the conditions of the electorate. The Australian plan of a double dissolution followed by a joint decisive session of the houses is far too cumbrous. It can be laid down that the two houses should hold a joint session whose majority shall prevail, but under this plan it is possible for the majority of the Upper Chamber to combine with the minority of the lower and overthrow the measures of the majority of the Lower Chamber and the ministry supported by it. In such a contingency, the minority of the legislature may be usurping the functions of the government and yet, if the Cabinet resigns, the opposition may not be able to form a government. Nor does it seem feasible to lay down that in case of disagreement, a two-thirds or some such majority of the Legislature should prevail. That again may give a chance to a party minority to veto government measures. The best plan seems to be that in force in England since 1911. The Parliament Act making the Speaker's decision final on its nature provides in substance that if a money-bill, having been passed by the House of Commons and sent to the House of Lords at least a month before the end of the session,

is not passed by that House without amendment within one month, it shall become an act on the royal assent being signified. In regard to other bills the act provides that if any public bill (other than a money-bill or one to extend the term of Parliament beyond five years) is passed by the House of Commons in three successive sessions (whether the same parliament or not) and is not passed by the House of Lords without amendment or with such amendments only as the Commons accept, it shall become an act on the royal assent being signified; provided two years have elapsed between the second reading in the House of Commons at the first session and the final passage by that House in the third session. The bill must be passed by the Commons each time in identical form, save for alterations made necessary by the lapse of time, and for amendments agreed to by both Houses.[1]

The plan advocated here will not make the legislative machinery too cumbrous and unworkable. But it will give the Upper Chamber a two years' veto on legislation. It will serve the objects which the Bryce Committee on the House of Lords reform in 1918 enumerated for the English Chamber and which *mutatis mutandis* apply to all Second Chambers. In the course of his letter to the Prime Minister, Bryce summarised the functions appropriate to a Second Chamber as follows:—

"(1) The examination and revision of Bills brought from the House of Commons, a function which has become more needed since, on many occasions during the last thirty years, the House of Commons has been obliged to act under special rules limiting debate.

1 A. L. Lowell, *Government of England*, I, pp. 432-33.

(2) The initiation of Bills dealing with subjects of a comparatively non-controversial character which may have an easier passage through the House of Commons if they have been fully discussed and put into a well-considered shape before being submitted to it.

(3) The interposition of so much delay (and no more) in the passing of a Bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it. This would be specially needed as regards Bills which affect the fundamentals of the Constitution or introduce new principles of legislation, or which raise issues whereon the opinion of the country may appear to be almost equally divided.

(4) Full and free discussion of large and important questions, such as those of foreign policy, at moments when the House of Commons may happen to be so much occupied that it cannot find sufficient time for them. Such discussions may often be all the more useful if conducted in an Assembly whose debates and divisions do not involve the fate of the Executive Government." (Para. 6.)

If the Senate is to have, in the last resort, only a suspensory veto, whence, it may be asked, are the guarantees to come against the rash and faulty legislation of an overwhelming majority in the Lower House? Guarantees are essential but it is submitted that, howsoever you may try, you cannot get them in the last resort from a second chamber without inviting more serious evils. A second chamber can no longer serve as a veto; it can, however, serve as a useful check, to be supplemented by other checks. Apart from the conscience and instructed judgment of the community, which is the essence of real public opinion as distinct from mere sectional opinion, the necessary safeguards

against a government may come from the existence of an alternative government—the opposition. Then it is possible to associate some advisory bodies with the Executive and the Legislature, which, though consultative, are bound to exercise a healthy influence. The device of circulating bills for opinion should prove a valuable safeguard against hasty or ill-considered legislation. The standing Committees will subject all bills to careful examination. Nor should the influence of the Departments on Ministers be forgotten. Under modern conditions, the Cabinet exercises a powerful control over the Chamber. Lastly, the Fundamental Law will serve to keep the majority everywhere from perpetrating the wrongs which most need to be guarded against.

The Legislative Assembly.

The Lower Chamber which, for the sake of political tradition, may continue to be called the Legislative Assembly or simply Assembly, as in many of the American States, presents no such difficulties as the basis and composition of the Upper Chamber involve. It should be elected on the direct popular suffrage. Adult suffrage is the ideal and now obtains in many countries. That India should attain to it as quickly as may be feasible with the real functioning of democracy and efficiency of administration may be admitted at once. The Indian peasant or labourer is not inferior to the average man anywhere else in native intelligence, shrewdness, sobriety or judgment. Nor is he too excitable. The masses everywhere are conservative and slow to move. The world has now outgrown the apprehensions once universally entertained from the extension of the franchise to the masses. Nowhere have the latter voted anarchy or plunder. In Switzerland, they have, on referendum, often rejected radical projects promoted

by reformers. Swiss Government, though, absolutely democratic, is yet very conservative. In certain States of the American Union, they have set their face against what some regard as progress. Sir Henry Maine was guilty of exaggeration, but he was not completely wrong when he argued with all his wealth of historical learning, that democratic government may prove very conservative and unprogressive.

A contemporary political genius, Benjamin Disraeli, understood that the masses were not unlikely to rally to the conservative banner. Not merely Tories, but men like Walter Bagehot said that they were " afraid of the ignorant multitude of the constituencies." But Disraeli possessed keener and truer political instincts. He successfully educated the conservative party into legislating an extension of the Franchise in 1867. The result did not belie his expectations. Again, after the enactment of practically adult suffrage in 1918, England has had a long spell of conservative government. Mr. Lloyd George headed a predominantly conservative coalition and the Labour Government of 1923-24 was never secure in office and never had any radical mandate from the majority of electors. The fact is, as political psychologists now recognize, that the average mind is indolent, wedded to habit and abhors any deep or sudden change. It requires great effort to convert it to reform. It may be safely asserted that no rash or thoughtless disturbance is likely to result from the masses exercising the power to vote. When given the vote, the Indian peasant may press for reform in land-tenure, more expenditure on village education, sanitation and communications, but there is no reason to fear that he will destroy the social order. But is it certain that in the present appalling illiteracy the grant of

the suffrage will mean its real exercise? It is permissible to doubt if the inability to read or write will not make adult suffrage either farcical or very difficult to manage. It is true that in every country, party-managers and party-newspapers succeed in clouding issues and confounding the judgment of large numbers of voters, that in every country considerations other than the public good determine too many votes, and that there are masses of men whose apathy baffles all skill and eloquence. These are, in the present general standards of education and character, the standing difficulties of democracy which political philosophers are lamenting in Europe, and, much more, in America. India cannot hope to escape them, and like others we shall have to face them and solve them. But general illiteracy makes them almost insurmountable. Villages, where hardly any one can read a paper or a leaflet, where hardly any one understands the political issues, may prove too pliable in the hands of petty government servants, landholders, priests, or demagogues. At the polling stations, wholesale illiteracy may open the door to wholesale fraud and corruption. One can certainly devise voting papers and boxes of different sizes and colours to assist the unfortunate voter, but he will be helpless against any designing and clever persons. In Italy there were a large number of illiterate voters but in the first place they were mixed with a fairly high percentage of literate ones and in the second place they did bring a considerable amount of confusion in elections. It seems that illiteracy must greatly diminish, if not disappear, before adult franchise can be a reality. An intensive campaign of primary education not merely among children, but among adults of all ages, supported by all available public funds and pub-

lic spirit, is an imperative political necessity. Adult education of a high standard is one of the most beneficent movements in the west to-day. In India it has to concern itself with the primary stage; its extension all over the land and among all classes will smooth the path of democracy. One need not be an idealist to believe that a really intensive campaign of education, conducted with all the resources and energy of the government, the local boards and the public should make the vast majority of the population literate, say in ten years. Big efforts of this kind have been made by many countries on the threshold of great enterprises—by Prussia, Japan and Turkey for instance. The new Indian Constitution should lay down that every citizen has the right to primary education, and that for the next ten years education should form the first charge on all budgets; that the Government of India should set apart a certain minimum amount for distribution among the provinces for primary education, that the local boards should further education above all else. It should be enacted that after ten years adult franchise shall obtain automatically for all federal, provincial or local elections.

In the interval.

For this interval it is difficult to devise any franchise that will be quite satisfactory. Literacy may be one qualification sufficient in itself; for the rest one has to fall back upon the possession of land, a certain minimum income, payment of a minimum rent, etc. Care should be taken to maintain on the electoral register the proportion which minorities bear to the population by prescribing different and, if necessary, lower qualifications for them. The spread of literacy will enlarge the electoral register at each subsequent election

until the lapse of ten years will see the establishment of adult suffrage. The federal and provincial franchises should always be the same though the local franchise should be wider and villages should from the start have primaries on the principle of adult suffrage.

Proportional Representation.

For the protection of the minorities, proportional representation suggests itself at first sight as a valuable safeguard. It now obtains in most of the countries on the European Continent and an active society has been agitating for its adoption in Great Britain. Almost automatically it secures the representation of every considerable group and school of opinion, which is prepared to organise itself, in direct proportion to its numerical strength. The device of adding up the votes of the same party in various districts ensures that a party is represented by its own spokesmen even in districts which it fails to carry. But it has already shown itself subject to a few serious drawbacks. In its various forms, it is too complicated for the intelligence of the ordinary voter, even in countries like Germany, Switzerland or Denmark where the standard of mass education is unusually high. The plan invented by M. d'Hondt in Belgium, which has generally been followed, involves intricate calculations which sometimes seem to pass almost into higher mathematics and baffle the uninitiated. In the large constituencies which it involves, all power tends to fall into the hands of party-managers, professionals, who can so manipulate the original lists of candidates as to impose their own nominees on the rank and file of the party. In the third place, proportionality, which presupposes huge constituencies, each electing a number of representatives

and, under certain schemes, as in Germany, all fusing ultimately into one vast country-wide electorate, destroys all sense of responsibility between the elector and the deputy. As a result, political interest tends to diminish. In the fourth place, it can make no satisfactory arrangement for by-elections which will always be necessary in this world of mortal men and which incidentally serve as useful indications of the pulse of public opinion between general elections. In the fifth place, proportionality multiplies the number of political groups as much on racial, religious, and economic lines as on genuinely political ones. It may emphasize any existing line of demarcation and thus perpetuate the social differences. Twenty years of Proportional Representation sufficed to produce as many as forty-five groups to elect ninety-six members, forming one-half of the Belgian legislature in 1922. It should be pointed out that this multiplicity of groups does not improve the chances of the strong, independent man as was expected. Speaking of the working of Proportionality in Ulster, Sir Charles Macnaghton made a notable confession in 1924. "I had thought" said he, "it would really give a chance to the independent man of ability and character . . . . to get elected under the system of Proportional Representation. I am convinced from the experience of the elections that the reverse is true." The fact is that proportionality only increases the power of group-managers and enables them, as for instance in Australia, to weed out strong men in favour of non-entities.

Finally, multiplicity of parties in the legislature makes the formation of a stable government very difficult. It does not conduce to unity and promptness of action essential to modern legislatures which exercise

great executive powers. On the other hand, it gives a tremendous impetus to log-rolling. A Belgian politician M. Smedt de Naeyer was constrained to remark in 1909 that "Proportional representation is dangerous, because the splitting up of parties, the inevitable consequence of the system, in the long run deprives Parliament of all authority." In Holland, Denmark, Poland, Switzerland, Finland, Germany, France, Czecho-Slovakia, and other countries, figures speak for themselves and demonstrate that proportionality has split old well-knit parties into fragments and produced a crop of fresh groups, based on racial, religious, economic or fancy interests. The result is intrigue and corrupt bargaining and comparative instability in government.

A minor evil is that the large number of groups needlessly prolongs the discussions and makes too heavy a demand on the time of modern overworked legislatures. After a single year's experience of Proportional Representation in Switzerland, the Minister of the Interior declared that it "has resulted in a considerable increase in the number of debates. The themes of the different groups are very frequently and lengthily expressed. The legislation has become more complicated and, in various respects, the task of government has become more difficult."

To sum up, the danger is that proportional representation may stifle the organic spirit of the government and of the nation. "The State," said Morley, "will not be fortified in its tasks by special electoral devices with a scent of algebra and decimals about them. These are not easily intelligible either in principle or working to plain men; they are more likely to irritate than to appease, to throw grit instead of oil among the

huge rolling shafts and grinding wheels of public government."[1]

Similarly, M. Renouvier, the French political philosopher declares that under Proportionality "opinions, special interests, exclusive proposals, progressive and reactionary schools of thought, would all organize groups of electors to the required number and then succeed in electing their candidates . . . . But the result would be an anarchical assembly, which would not reflect the average opinions and desires, and which, through its consequent inability to perform its legislative functions, would soon give place to some form of usurped authority."[2]

Prospects in India.

The evils of proportional representation already apparent in western countries are likely to be intensified under Indian conditions. The Indian voter may from the start fall completely into the net of wire-pullers without even the advantage of those political traditions which have been built up in Europe. What is equally bad, small parties may be formed on the basis of sub-castes of sub-castes, sub-sects of sub-sects. The small territorial constituency, on the other hand, will not generally admit of more than three or four candidates and there will be the inevitable tendency for a straight

1 Morley, *Notes on History and Politics*, 197-98.

2 On the whole subject of Proportional Representation, see George Horwill, *Proportional Representation*; J. H. Humphrey, *Proportional Representation*; J. F. Williams, *Reform of Political Representation*; Pember Reeves, *State Experiments in Australia and New Zealand*; Hare, *Election of Representatives*; Commons, *Proportional Representation*; Finer, *The Case against Proportional Representation*; Rogers and McBain, *New Constitutions of Europe*; Headlam Morley, *The New Democratic Constitutions of Europe*. The *Statesman's Year Books* and the *Annual Register* contain a good deal of useful information.

fight between two candidates. Under either banner will be found people of various social and sectarian groups and public life may gradually be weaned from narrow sectionalism. Each candidate even when stooping to exploit a particular group-feeling, will be compelled to seek the suffrage of others and will learn the wisdom and expediency of a broad policy based on the general interest. Under proportional representation, on the contrary, it will be possible for a Brahman to be elected by purely Brahman votes, for a Sanatanist to emblazen ancient orthodoxy on his flag and attract more than sufficient votes, for a Shia or a Sunni to defy the rival sect and yet manage to be returned. The supreme need of Indian public life is that citizenship should supplant religious and caste fraternity. Proportional Representation will only stress and multiply social divisions and split even minorities into small groups. When the narrow cliques are reflected in the exact proportions in the Legislatures, they will pull in so many directions that any concerted political action, any approach to the two-party system, any approximation even to a fairly stable group system will be well nigh impossible. So proportional representation must be out of court in India.

Separate Electorates.

Nor will separate electorates answer the needs of the situation. To fix a proportion for a capable minority is to debar it from all chance of contributing its full quota to the service of the country. It may stiffen the attitude of the inevitable majority, make them wholly independent of the minority, and therefore indifferent to its interests. It puts a premium on sectionalism and leaves charlatans free to awaken and exploit latent reserves of fanaticism in their pur-

suit of communal leadership as a step to office. Personal ambition playing on communal spirit produces that worst kind of fanatic—the artificial fanatic. Separate Electorates seem to compel even liberal-minded politicians to narrow their vision and sympathies. What strikes deep in Politics, said Lord Morley, strikes deep all round. Communalism in high politics will inevitably mean communalism at the expense of the common good and efficiency, in the local boards, in public services, in education and social intercourse. The failure of the class-vote system is writ large over the ruins of the Austro-Hungarian Empire. The tenour of Indian public life during the last several years has amply demonstrated, what might have been foreseen long ago, that separatist elections poison the springs of public opinion at their very source and retard the growth of real public life, as distinct from petty grooves of sectional life. How, then, are the interests of the minorities to be protected and their fears allayed?

Apart from comprehensive constitutional guarantees, the best plan appears to be that set forth in the report of the constitutional committee of the All Parties Conference in August 1928. Outside Bengal and the Punjab where the geographical distribution of the principal groups renders all reservation unnecessary, the Muslim or the Hindu minorities, as the case may be, in the other provinces should be free to contest all elections and win as many seats as they can, but if they fail to obtain their numerical quota, the difference should be made up by the grant of additional seats to them. In practice this will necessitate plural constituencies in certain zones in each province so as to allocate additional

The Recommendations.

seats to the minorities in case of need. But the difficulty can be got over after collecting the necessary statistics of the distribution of populations. Until the introduction of adult suffrage, the interests of minorities should be guaranteed, as already indicated by prescribing different qualifications if necessary, to maintain the population ratio on the Electoral Register. There ought to be no residential qualifications for candidates—a provision which has immensely reduced the number of capable men in the public life of the United States.

Distribution of Seats.

The seats in the Federal Assembly should be distributed among the various provinces in strict numerical proportion and the quota should be revised with each decennial census. A ratio of one seat for every 500,000 inhabitants with a fraction of more than 250,000 counting as half a million should at present mean an Assembly of 491 members. Ajmere-Marwara, Delhi (as constituted at present), British Baluchistan and Coorg which contain less than 500,000 inhabitants each according to the census of 1921 should, as original members of the Federation, be given one seat each in the Assembly; hence the total number would be 495.

The seats would be distributed among the various provinces as follows :—

	Province.	Population according to the census of 1921.	Number of Seats in the Assembly.
1.	Bengal	46,695,536	93
2.	The United Provinces ...	45,375,787	91
3.	Madras Presidency ..	42,318,985	85

	Province.	Population according to the census of 1921.	Number of Seats in the Assembly.
4.	Bihar and Orissa	34,002,189	68
5.	The Punjab	20,685,024	41
6.	Bombay Presidency ...	19,348,219	39
7.	The Central Provinces and Berar	13,912,760	28
8.	Burma	13,169,099	26
9.	Assam	7,606,230	15
10.	The North-West Frontier Pro- ...	2,251,340	5
11.	Ajmer-Marwara	495,271	1
12.	Delhi	488,188	1
13.	British Baluchistan ...	420,648	1
14.	Coorg	163,838	1
	Andamans and Nicobars ...	27,086	...
	Total ...	247,003,293	495

Alterations in the boundaries of provinces will only slightly increase or decrease the total membership of the Assembly. On an average, it will consist of nearly 500 representatives. If and when the Indian States come in, the same rules may be applied to them.

Among them, the seats would be distributed somewhat as follows :—

States.	Population (1921).	Seats in the Assembly.
1. Hyderabad ...	12,471,770	25
2. Rajputana Agency	9,844,334	20
Bikaner ...	659,685	1
Udaipur ...	1,380,063	3
Jodhpur ...	1,841,642	4
Jaipur ...	2,338,802	5
Alwar ...	701,154	1
Kotah ...	630,060	1
Other States ...	2,289,372	5
3. Bombay States ...	7,409,429	15
4. Central India Agency	5,997,023	12
Indore ...	1,151,578	2
Bhopal ...	692,448	1
Rewah ...	1,401,672	3
Other States ...	2,751,325	6
5. Mysore ...	5,978,892	12
6. Madras States ...	5,460,312	10
Travancore ...	4,006,062	8
Cochin ...	979,019	2
Other States ...	475,231	(To form constituencies with other territory.)

	States.	Population (1921).	Seats in the Assembly.	
7.	The Punjab States...	4,416,036		9
	Bhawalpur ...	781,191	2	
	Patiala ...	1,499,739	3	
	Other States ...	2,135,106	4	
8.	Bihar and Orissa States	3,959,669		8
9.	Kashmir ...	3,320,518		7
10.	Gwalior ...	3,185,075		6
11.	Baroda ...	2,126,522		4
12.	C. P. States ...	2,066,900		4
13.	N.-W. F. States ...	1,622,094		3
14.	U. P. States ...	1,134,881		2
15.	Bengal ...	896,926		1
	Cooch Behar ...	592,989	1	
	Tripura* ...	304,437	...	
16	Assam States* ...	384,046	...	
17	Baluchistan States*...	378,877	...	
18	Sikkim*... ...	81,721	...	
				139

* To be joined with other territory to form a constituency.

When the states grouped together in the above table are dealt with individually, the rule of fractions will slightly affect the total number but will keep the seats somewhere in the neighbourhood of 140. As in the case

of the Senate, seats shall be re-distributed after each decennial census.

In the immediate future the number of the Assembly will be about 500. This number should be enough to secure the representation of all interests, opinions, and viewpoints. Nor should it prove too large for deliberation. The British House of Commons representing an area and a population roughly equal to those of the United Provinces of Agra and Oudh, consists of 615 members. The French Chamber now consists of 626 deputies.

Everywhere one may be sure that the distance, illnesses, and professional engagements will always keep a number of legislators away. In European countries, even of those who come to the capital, not a few lounge away in clubs, saloons, libraries and terraces. A complete House is rare, almost unknown, while too often the whips find it difficult to maintain a quorum. So the number of the Indian Legislature, even when increased after the admission of some or all Indian States into the Federation, need not prove unwieldy for effective transaction of business.

Elections.

As numerous constitutions provide, all elections should be held on Sundays or public holidays (Austrian Constitution, Art., 26[3]). In France and other Catholic countries, elections are now invariably held on Sundays. It need hardly be added that a very stringent Corrupt Practices Act is essential to check electoral corruption. Milder laws proved ineffective in France. "It may safely be said" remarked Aristide Briand in 1910, "that corruption generally escapes all repression." So, the laws of July 29, 1913, and March 31, 1914, provided for heavier fines and imprisonments, and prescribed double penalties for public officials.

All election disputes should be tried by the ordinary courts and not settled by the Assembly or the Senate.

Disputed Elections.

The British House of Commons, which long exercised the right to decide disputed elections, generally voted on party-lines irrespective of the merits of the case. In recent years the convention has grown up of referring such cases to the courts and registering the verdict in resolutions of the House. In the United States, the Senate or the House of Representatives has not proved more impartial than the House of Commons in former times. In France, Bureaux chosen by lot report on disputed election but the Chamber decides, generally on party lines. There are French parties which advocate the transfer of decision on election disputes to the Council of State. The only safe course is to transfer such matters to the calm atmosphere of the courts. The present Indian plan of election tribunals consisting of three judicial officers of a certain standing should answer well.

Powers and Functions of the Legislatures.

On the powers and functions of the legislatures little need be said here. Everywhere they comprise legislation, grant of supplies and appropriations, and, except under Presidential Governments, interpellations, discussions on all national questions, making and unmaking the Executive. Everywhere the House is a great Ventilating Chamber. It is however understood that the resolution of neither house is a law. In England the principle was established in the case *Stockdale* vs. *Hansard*.

The French practice of treating debates on Interpellations as votes of confidence or censure, involving the fall of the Ministry, has proved disastrous to

governmental stability. The Italian arrangement minimises the French evil by prescribing that the vote on interpellations should be taken after an interval of several days so as to allow passions to cool down. But the limitation does not altogether do away with the mischief.

Selective Function.

The House of Commons, writes Sidney Low, "is a great arena and training-ground for public men; here they have the opportunity of showing their mettle and displaying their qualities of mind and character, which distinguish the sheep from the shepherd, and the rulers from the ruled. Here by a long process of reversed gravitation the large intellects, through years of friction and contest, gradually rise to the surface, while lighter and smaller men settle down in obscurer depths." This is the role which every legislature has to play in a parliamentary government.

Money-Bills.

Only in the interest of the subsequent discussion it may be pointed out that the term legislature has long been a misnomer and that some of the most important functions of the Legislature are Executive. That position must be fairly and squarely faced and allowed for in the method of appointing the executive. Following the British convention, it should, however, be enacted that the ministers alone can propose expenditure and that the House, while competent to reduce, cannot enhance expenditure. The Irish Constitution has incorporated this provision in the Fundamental Law. "Money shall not be appropriated by vote, resolution or law, unless the purpose of the appropriation has, in the same session been recommended by a message from the representative of the Crown acting on the advice of the Executive Council." (§37.)

A money-bill means a bill which contains only provisions dealing with all or any of following:— namely, the imposition, repeal, remission, alteration or regulation of taxation, the imposition for the payment of debt or other financial purposes of charges on public moneys, or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guaranteeing of any loan or the repayment thereof; subordinate matters incidental to these subjects or any of them. Art. 35 lays down that the Chairman of the Dail Eireann certifies to the character of a money-bill, but on a requisition of two-fifths of the members of either house within three days of the passage of the Bill by the Dail Eireann, the question goes to a Committee of Privileges. On money-bills, the Dail Eireann shall have exclusive Legislative Authority. In India the cumbrous Joint Committee of Privileges need not be set up but the constitution should lay down that expenditure can be proposed only by the executive. The dominions have already done so in their constitutions. France, Italy and other countries have suffered grievously from the absence of such a rule.

Procedure.

The Procedure of the new Houses of the Indian Legislature may be based on that of the existing ones, on that of the British Parliament, with appropriate borrowings from elsewhere. Only a few salient points may be emphasised here. In the House of Representatives of the American Congress, the Speaker acts avowedly as the leader of a party and gives it an advantage in the order of debate, and in the composition of the committees. In the French Chamber the position has improved, but the President

President.

does not yet command the implicit confidence of all parties. He stands midway between his English and American proto-types. His continuous election is only now becoming the rule. In the British House of Commons, the Speaker shakes off all partisanship on his way to the chair, acts with perfect impartiality and is re-elected as often as he is willing to serve. It may be hoped that the British tradition will take root in both Houses of the Indian Legislature. As procedure becomes inevitably more intricate, it will be desirable to have generally in the chair one who is a repository of rules and precedents and who will be able to guide deliberations without creating a sense of unfairness in any quarter. A deputy-president and panel of chairmen may be set up to act for the President in his absence and to qualify for future permanent service in the chair. On the floor of the House he should have only a casting vote which, by convention, should generally be given for the *status quo* so as to render possible the reconsideration of the proposal in question. To ensure the independence of the Legislature from the Executive, it should be laid down that the President of the Assembly should exercise powers of discipline and police within the Assembly building. He should appoint officials like the Clerk of the House, Sergeant-at-arms, and door-keepers.

Public Sittings.

The sittings of the Assembly and the Senate should normally be public. The new constitutions contain express provisions on the matter. Thus the German Constitution (Art. 29) lays down that the sittings of the Reichstag shall be public but that on demand of fifty deputies, the public may be excluded by a two-thirds majority. The Austrian Constitution (Art. 32) prescribes public sittings, but lays down that on the

demand of the presiding officer or of one-fifth of the members present, the Nationalrat in executive session may resolve on the exclusion of strangers. According to the Polish Constitution, Article 30, "the meetings of the Sejm (the Lower House) are public. On the motion of the Marshal, a Government Representative, or of thirty deputies, the Sejm may vote the secrecy of its meetings." The constitution of the City of Danzig (§19) after prescribing public sittings, permits the exclusion of strangers by a two-thirds majority. The Irish Free State Constitution (§25) has the same provision. The Indian Legislature should be empowered to meet in closed doors by a resolution passed by a two-thirds majority on the motion of at least one-fifth of the members present.

Committees.

Two generations ago, Gladstone exclaimed that "the parliament is overweighted; the parliament is almost overwhelmed." From Greece onwards, says Bryce, all history shows that, "the most abiding difficulty of free government is to get large assemblies to work promptly and smoothly either for legislative or executive purposes."[1] Hence the device of relegating a vast amount of work to committees which can thrash out details at leisure. The growth of state activity in recent times is enough to overwhelm any legislature. In many countries legislatures work through committees, and thus multiply their capacity for work. Not only is fuller discussion of measures possible in committees, but it gives the legislators an insight into administrative methods, and a knowledge of their details which

[1] *American Commonwealth*, I, p. 157.

can rarely be acquired on the floor of the House. The Legislatures of the American Union and the States usually work through committees and get through an amount of business which would otherwise break them. The Indian Constitution may lay down that every committee should reflect the party-complexion of the house. While reserving the power to appoint *ad hoc* committees, the House should constitute a series of standing committees on the Interior, Finance, Foreign Affairs, Army and Navy, Air Force, Social Welfare, Railways, Posts, Telegraphs, etc., empowered not merely to consider and report on all relevant measures, but also to remain in constant touch with the working of those Departments.

Committees in America.

In the sixty-first American Congress, the Senate had seventy-two committees, each appointed for two years and each consisting of from 3 to 17 members. Every bill, after the first and second readings, went to the appropriate committee which reported on it. The House of representatives had fifty-two standing committees, each consisting of from three to twenty-one members, the most important being those on Ways and Means; Appropriations; Elections; Banking and Currency; Accounts; Rivers and Harbours; Judiciary (including changes in private law); Railways and Canals; War; Navy, etc. Owing to the lack of ministerial leadership in Congress, the Committee system has certainly lessened the cohesion and harmony of legislation, reduced responsibility, and opened an additional door to underhand and corrupt influences. The last evil is particularly rampant in the States.

"Round the Committees," says Bryce, "there buzzes that swarm of professional agents which

Americans call the 'lobby,' soliciting the members, threatening them with trouble in their constituencies, plying them with all sorts of inducements, treating them to dinners, and cigars" (*American Commonwealth* 1, p. 549). The evil is, however, not inherent in the Committee System. It is due to two causes, firstly, the absence of executive leadership, and, secondly, the practice of treating Private Bills—those affecting particular localities or interests only—as Public Bills. If these two cardinal defects of American organisation were removed, the Committees would only be a source of strength to the legislature. Already, the public hearings of legislative committees in Massachusetts and other American States have proved very serviceable. American experience has also proved that committees should not be unimportant, nor too large, nor too watertight, and that they should be authorised occasionally to confer together.

One danger which the working of the committee system has revealed in France must also be guarded against. There a committee nominated by the bureaux might include a majority of the opponents of the government and either transform or practically throttle Government measures. The rapporteur or chairman of the committee became an inconvenient rival of the Minister in charge of the department concerned. Thus the rapporteur of the Finance Committee seemed to be a Second Finance Minister. The Budget Committee not only examined and revised but also sometimes annulled and utterly reversed the financial proposals of the Ministers. Hit behind the back, the Executive failed in its essential task—the task of driving a consistent tendency through affairs. It is true that the bureaux of the French legis-

In France.

lature, which tended to become almost executive bodies, secured a continuity of policy which the fleeting ministries failed to guarantee. But the weakness of the government under their operation was often pathetic. *Ad hoc* committees appointed to consider particular measures were not very serviceable. Writing in 1889, two publicists remarked, "these multiple committees named according to the accident of the composition of the bureaux, having no tradition, able to devote themselves to no study, followed in an order of determined ideas, whose members will shortly be scattered among other committees with an absolutely different object, present the picture of a very complicated mechanism, whose works and various organs are entangled with each other, and which, for a great expenditure of energy and movement, give quite inadequate results."

Reform in France.

In 1898, as a tentative measure, a number of committees were set up on a permanent basis. Some rules were adopted in 1902, which as modified in 1910, 1915 and 1920, provide for twenty-one Committees of forty-four members each. Since 1910, the parties have been represented proportionally on the committees. Otherwise, either the Government would be discomfited, or as Jean Jaures said, a committee would give long months of sterile work to the shaping of a bill which would collapse at the first meeting of the fortuitous committee with the chamber. When a bill returns to the chamber, the Committee occupies a bench immediately facing the tribune and adjoining the ministerial bench.

The position has further altered in recent years, but the French ministry still occasionally feels uncomfortable mainly because ministers do not sit on the

committees. It may be suggested that committees, besides reflecting the distribution of parties in the chamber, and thus automatically securing a Government majority, should be presided over by the minister of the department concerned, or his deputy or his nominee. It is necessary that leadership should not be "spread thin." The element of chance in the composition of committees should be eliminated so far as possible. There can be no justification for the French practice of lot in the election of bureaux. Voting in the Committees may be somewhat freer than in the House, but on its own measures the Government can either accept the changes made or have them reversed on the floor. The need of standing committees is being felt more and more in England. Sidney Low strongly advocates a Foreign Relations Committee of Parliament authorised to call for papers, documents, correspondence, drafts of agreements or conventions.[1] The standing committees so far instituted in the British Parliament have proved immensely useful since Mr. Gladstone first proposed their establishment in 1882. It is understood that in England, as elsewhere, the House may go into Committee of the Whole on Supplies, Appropriations and other important matters when the President is to be replaced by a Chairman and the discussion is to be more informal. The task of forming committees will be facilitated by the institution of a Committee on Committees which should draw up lists of Committee assignments on the party-basis and present them for acceptance or modification to the House.

1 Sidney Low, *Governance of England*, p. 303.

Besides expediting legislative business, these Committees will render some other useful services. The proposals of the Cabinet which is bound to have the initiative and, therefore, the greatest share, in legislation will improve by prior consultation with standing committees. The general policy and the details will be suffused with larger experience, and, in some cases, wider knowledge. Service on the Committees will keep the members adequately supplied with information, deepen their insight into affairs and steady their judgment. It will provide invaluable training to aspirants to office. The general level of knowledge and ability in the Legislature will rise. The country will obtain the services of a number of trained and well-informed public men to guide public opinion. Joint Committees will also serve the purpose of keeping the two Chambers in touch with each other. In the Swedish Riksdag, Committees of equal members from both houses work together, expressing opinions on all bills, and mediating between the two chambers (Art. §53). It is interesting to notice that the Riksdag sets up a constitutional committee to enforce ministerial responsibility. The Swedish Constitution also prescribes a Foreign Affairs Committee.

Utility of Committees.

A few of the new Constitutions make the institution of committees of investigation obligatory in certain contingencies. For instance, the Prussian Constitution Article 25 (1) lays down that the Landtag shall have the right to, and upon the proposal of one-fifth of the members must, set up committees of investigation. The Constitution of the City of Danzig (§19) demands that committees of inquiry must be appointed on

Committees of Investigation.

the demand of one-fifth of the members. But this provision is only too likely to be abused by the opposition or by any single discontented group. The Legislature may be left free to set up committees of investigation whenever it thinks fit.

Each House should ordinarily have its own committee of investigation, but whenever necessary the corresponding committees should sit together and, joint committees may also be formally constituted. In addition to all such committees there should be a Recess Committee, of about forty members which should take the place of the regular parliament during adjournments. The need of such a check on the executive has been felt in many countries and has been provided for in the new constitutions of Europe. In the course of a sketch of Sir Robert Peel, Lord Rosebery stated in 1899 that "during the whole of the parliamentary recess, we have not the faintest idea of what our rulers are doing, or planning, or negotiating, except in so far as light is afforded by the independent investigations of the Press." That press "investigations" are often wide of the mark is known to students of recent history. The only satisfactory way out of the difficulty is the institution of a Recess Committee.[1]

Recess Committee.

Two articles in the Prussian Constitution clearly bring out the purpose for which Recess Committees have been set up. "The Landtag (the Prussian legislature) shall appoint a standing committee for the protection of the rights of the representative body over against

1 For the Recess and other Committees in German Governance, see *The German Constitution*, Art. 35.

the Ministry of State, for the period between sessions and between the expiration of a legislative term or a dissolution of the Landtag and the convening of a new Landtag. This Committee shall have the powers of a committee of investigation. Its composition shall be regulated by the rules of procedure." (Art. 26.) A subsequent Article, 55, provides that "if the maintenance of public safety or the meeting of an unusual emergency requires it, the Ministry of State may, when the Landtag is not in session, in conjunction with the standing committee provided for in Article 26 issue ordinances not in conflict with this constitution, which shall have the force of laws. Such ordinances must be submitted to the Landtag for approval at its next session. If approval is refused, the ordinances must be immediately declared void by publication in the Law Gazette."

In Czecho-Slovakia the Constitution prescribes a Recess Committee of 16 members from the Chamber of Deputies and eight from the Senate (Art. §54). "This Committee shall act on all matters of immediate urgency, even if in ordinary circumstances they should require the enactment of legislation and shall exercise control of all government and executive powers. The term of office of the Committee is one year." The committee shall elect its own chairman. Alternates may take the place of members when necessary. The Constitutional Court is expressly vested with jurisdiction over such measures of the Committee as would otherwise require enactment. The Mexican Constitution (§78-79) requires the Recess Committee to be elected on the eve of the adjournment, to consist of fourteen senators and fifteen representatives, to authorise the use of the national guard, to administer oaths of office on occa-

sions and to report on all pending matters so that they be considered in the next session.

Private Bills.

Every legislature is occasionally called upon to consider bills which do not concern the whole country but only affect a single locality or a few interests. Reinsch calculated that the total number of acts passed by legislatures in the United States in five years from 1899 to 1904 was 45,552 of which 16,320 were public Acts and the rest numbering 29,232 were special and local. It is here that the greatest amount of corruption and log-rolling—"lobbying"—takes place in America, demoralising the Legislature, the representatives, and the constituencies alike. In Canada, New Zealand and France, too, the practice of voting large sums for "local improvements" has led to intrigue and corruption.[1] The only effective remedy is that suggested by English practice which submits all private Bills to Private Bill Committees, which subject them to a quasi-judicial examination and remove them[2] clean out of party politics.[3]

Privileges.

The privileges of Indian legislators should correspond with those which obtain elsewhere. Only three points may be touched upon. All verbatim reports or *bona fide* summaries of proceedings in the Legislature should be privileged, but a single speech or interpellation pub-

1 Bryce, *Modern Democracies*, II, 481, 523.

2 See Reinsch, *American Legislatures and Legislative Methods*, p. 300.

3 For a detailed account. A. Lawrence Lowell, *Government of England*, I, 367 (Ch. XX).

lished with malicious intent should be liable. That is the provision of the German Constitution and the present position in English Law.[1] As in Germany, a legislator should forfeit his allowance for the day that he absents himself from the session. When legislative sessions become long, it will not be possible in a country of huge distances like India, for legislators to attend to their business or profession. A salary is essential. Besides receiving the usual travelling allowance when attending the Legislature, a member should be entitled to travel at all times free on all railways within the area of his constituency. In Germany where the compact list system of proportional representation prevails and where every delegate is supposed to represent the whole country every legislator is entitled to travel free on all German railways. The Polish Constitution, §24 prescribes that "the deputies receive compensation the amount of which is determined by the standing orders, and are entitled to the free use of the state means of communication for travelling over the whole territory of the Republic." Art. §23 of the Irish Constitution ordains that "the Oireachtas shall make provision for the payment of its members and may in addition provide them with free travelling facilities in any part of

1 *Cf. The Polish Constitution*, §31. "No one may be called to account for a truthful report of an open meeting of the Sejm or a committee of the Sejm." In France, under the law of 1881, no action lies against a member because of any speech delivered in either chamber or published by their orders. The United States Constitution (Sec. 6) exonerates legislators from liability for any speech or debate and from arrest except for treason, felony and breach of the peace during their attendance.

Ireland." In Italy, too, legislators enjoy the privilege of free travel on railways. The Norwegian Constitution (Art. §65) directs that legislators be paid a salary of 3,000 kroner for an ordinary storthing, travelling allowances and expenses for curative treatment and nursing in case of illness. It does not seem particularly desirable to encourage legislators to fall ill at state expense. In India the territorial system of constituencies does not render it necessary, nor will the interests of railway finance permit, that a representative should be able to travel free all over the vast country. But it is necessary that he should keep in intimate touch with all parts of his constituency and should have an incentive to promote the political education of his constituents. The privilege of free travel within the constituency at all times will go a long way to sustain the representative's interest in the people and the popular interest in politics.

Professional Representation.

Recently there has grown up a school of political thought which advocates the substitution of the professional for the territorial basis of representation. The idea is not quite original. The medieval estates were based on classes, the clergy, the nobility, the knights, the townsfolk. The vestiges of the practice survived into the 19th century, in Central Europe. The Austrian Constitution as amended in 1873, vested the power of electing the Abgeordnetenhaus in voters organised in four classes—the great landowners, the cities, the chambers of commerce and industry and the rural communes. In 1896, a fifth class of general voters was created and empowered to elect about one-sixth of the total number of deputies. Only in 1907 was the class-system abolished, and an approach made

to manhood suffrage. In the 19th century, the Diet or Landtag of Finland consisted of four estates—the nobility, the clergy, the Bourgeoisie and the peasants, each sitting as a separate house. Prof. Duguit is inclined to establish a second chamber on the functional basis. It is argued that common habitation is no guarantee of common interests, that a labourer, a clerk or a physician has much more in common with the followers of his occupation in the most distant parts of the country than with his next-door neighbour who plies a different trade, that opinion in regard to all that matters in life, runs on occupational and not on territorial lines and that the occupations should elect such governing assemblies as may be necessary. Professional representation, however, is open to all the objections to which proportional representation is subject. Its inevitable result will be that every one will stand for a faction and hardly any one for the state. Yet what is wanted is that the state should be an effective search for integration. In addition, professional representation presents the almost insuperable difficulties of estimating the relative importance of the various occupations and dividing the representation among them. Mr. G. D. H. Cole, who advocates a joint congress of the supreme bodies to represent each of the main functions in society fails to evolve any scheme of the distribution of seats.[1] The professional element is represented in various degrees in several upper chambers in the West but the allotment of seats can hardly be regarded satisfactory. Sidney Low would introduce a

1 See *Self-Government in Industry*, 1918; *Social Theory*, 1920; *Guild Socialism*, 1920.

professional element in the House of Lords in England but he fails to evolve an equitable scheme.[1]

"The Constitution for the Socialist Commonwealth of Great Britain" drawn by Sidney and Beatrice Webb wants a social and a political parliament, coequal and independent, the former, *inter alia*, to control and legislate on social and economic matters but the authors fail to indicate how finance will be managed. Von Delbrück was inclined to think that the German Economic Council would develop into a real second chamber, but the inherent difficulties have prevented any such consummation. Nevertheless, it must be admitted that professional opinion exists, that it is capable, more than anything else, of giving adequate expression to professional interests, that, on the basis of its special knowledge, it may suggest valuable reforms. It is desirable to organise it and, without giving it power, to entrench it in a position whence it may influence legislation.

Prussia.

As early as January, 1881, Bismarck instituted a Prussian Economic Council, consisting of 75 members, of whom 30 were nominated by the Government from among handicraftsmen and workers and 45 were selected from a panel elected by agricultural, economic and commercial chambers. All held office for five years. Important economic projects were referred to it for advice before they were placed on the statute-book. This council, however, ceased to function after 1887, owing to the complications of the political situation.

1 Sidney Low, *Governance of England* (Revised Edition), pp. 245 ff.

Poland.

In this connection Article 68 of the Polish Constitution runs as follows:—

"A special statute will create, in addition to territorial self-government economic self-government for the individual fields of economic life; namely, chambers of agriculture, commerce, industry, arts and crafts, hired labour and others, united into a supreme Economic Council of the Republic, the collaboration of which with state authorities, in directing economic life and in the field of legislative proposals will be determined by statutes."

Austria.

The Austrian Constitution is silent on the point but a National Law has instituted in each Austrian State a workers' chamber which varies in size from state to state and which consists of representatives of manual workers and clerical employees in some public services as well as in particular industries.

Jugo-Slavia.

Article 44 of the Constitution of Jugo-Slavia wants an economic council for the framing of social and economic legislation.

Danzig.

Article 45 of the Constitution of Danzig would allow bills to be introduced into the legislature by legally constituted bodies representing the various professions and trades. "Bills dealing with economic and social questions shall be submitted to these bodies for approval." Here the economic associations are given the initiative as well as the power of approval.

Ireland.

Article 45 of the Irish Constitution allows that "the Oireachtas (the legislature) may provide for the establishment of Functional or Vocational Councils representing branches of the social and economic life of the

Nation. A law establishing any such Council shall determine its powers, rights and duties and its relation to the Government of the Irish Free State."

Italy.

In October, 1920, the Italian Government tried to replace the old Superior Council of Labour by a consultative technical parliament comprising 75 representatives of workers' organisations and 75 of employers' organisations. The regulation of industry and the relations between capital and labour were to be its chief concern. It was to be divided into an agricultural section and a joint industrial and commercial section, each with a permanent committee.

England.

In England, no Economic Council has been instituted, but the National Industrial Conference which met under government auspices a few years ago to solve some difficult problems was composed of representatives of all economic organisations. It warmly advocated the institution of a representative Standing National Industrial Council. The coalition government did not carry out the proposal though Mr. Lloyd George had in his letters approved of it, but the proposal of a Parliament of Industry, based on trade unions and employers' organisations was again advocated in 1922 by Mr. Arthur Henderson and supported by a statesman of the other school, Lord Milner.[1]

Germany.

After a protracted discussion of various schemes in 1918-19, the Germans evolved the plan of a Federal Economic Council elected by occupational associations in certain proportions, discussing all economic matters, giving

1 Finer, *Representative Government and a Parliament of Industry*, pp. 28—34.

its opinion on all economic measures before the Legislature and itself originating proposals for the consideration of the Legislature. The provisional Economic Council, as set up in Germany, a few years ago, is avowedly an Advisory body, but from its constitution and position it has exercised considerable influence in economic legislation, helped in the solution of some difficult problems, projected some useful changes and, last but not least, smoothed the clash of economic interests by bringing together the representatives of conflicting and neutral interests. Its constitution is prescribed by Article 165 of the new German Constitution which calls for the establishment of three grades of Works Councils—for factories, districts and the Reich —and for two grades of Economic Councils—for districts and for the Reich, " for the purpose of looking after their economic and social interests." As provisionally constituted, by a Decree of May 4, 1920, Der Reichswirtschaftsrat—the Federal Economic Council—comprised 326 members distributed as follows:—

68 Representatives of Agriculture and Forestry.

68 Representatives of general industry.

44 Representatives of Commerce, Banking and Insurance.

36 Representatives of small business and industries (handicrafts).

34 Representatives of Transport Services (water and railway transport and postal services).

16 Representatives of the Civil Servants and the Professions.

6 Representatives of market industries and fisheries.

30 Representatives of Consumers (municipalities, consumers' associations and organizations of women).

24 Nominated by the Government.[1]

It may be admitted that some of the expectations formed of the German Economic Council in 1919-20 have not been fulfilled and that some German politicians regard it as an expensive luxury. But by no stretch of facts can it be described as a failure. Its bitterest opponents admit that it has rendered some meritorious services to economic investigation and legislation and that as its experience grows it may develop into an invaluable source of advice and suggestion.

The German Economic Council pre-supposes the organisation of the various Economic interests,—Chambers of Agriculture, of various industries and commerce, trade-unions, mill-owners' associations. Economic activities have in all ages and countries displayed a tendency to organisation and self-regulation, a tendency well exemplified in craft guilds and merchant guilds in ancient India and medieval Europe. India has already got her Bar-Associations, Medical Associations, Teachers' Federations, Chambers of Commerce, Millowners' Associations, Trade Unions, Postal Employees' Association, Railway Men's Associations, Landholders' Associations. Peasants' Unions are arising and may be expected to organise themselves more closely in future. All such occupational associations can be authorisd to nominate members to the Economic Coun-

Application to India.

[1] For a fuller description, see Finer, *Representative Government and a Parliament of Industry*. The sub-title of the book is "A study in the German Federal Economic Council."

cil. Where an Economic interest is not sufficiently organised, the power of nomination should be exercised by the Government. Finally, the Government should in any case nominate some experts not exceeding 10 per cent of the total membership from the ranks of Government officials, from Universities and from other well-informed quarters. The members of the Economic Council should enjoy the same privileges, the same remuneration and travelling facilities as may be accorded to the members of the legislature. The Constitution should provide that all economic measures laid before the Senate or the Assembly should be sent to the Economic Council for opinion, and that its opinion should be considered by the Legislature which shall however be completely free to accept or reject or modify it. Similarly, all economic measures initiated by the Economic Council should be placed for consideration and decision before the Legislature. Any doubts whether a measure is really economic or not should be settled by the president of the Lower Chamber. The Economic Council should adopt the same procedure of deliberation as that of the Legislature, and should work mainly through Committees, which, when necessary, may collaborate with committees of the Legisla-

Utility of the Council.

Such a body will prove very useful in the handling of the Social and Economic problems, which are coming to the front in the country. The discussion of currency, exchange, banking, customs, land-tenure, consolidation of holdings, housing, insurance, and other projects of social amelioration will be illuminated by the clash of expertise in the Economic Council. Working together, the Legislature and the Council should secure due consideration of the remote

effects, direct and indirect, of Legislative proposals, adjustments of conflicting interests and compromises of opposing views. The Council will be a thought-organisation, while a Legislature under modern conditions can only hope to be a will-organisation. It will supply the need of knowledge which Legislatures themselves have long felt and tried to obtain through special commissions and deputations, which only too often are neither representative nor expert bodies. They collect a good deal of information but, with rare exceptions, they fail as thought organs. Since the Universities are out of touch with life and the press has become an instrument of mere publicity rather than of thought we can only fall back on an expert Council for the formulation of Social and Economic projects. It will be most serviceable just in regard to those vital questions where party Government is failing both in Europe and America. The predominantly economic character is likely to keep the council free from the turmoil of party-politics. Here the closure or guillotine will not stifle discussion. The economic council will supply first-hand information, while the civil service can supply only second-hand knowledge.

As a German writer says, the economic council should help to bridge over the serious division in interests between workers and employers and to transform an association of master and servant into an association of partners. It pre-supposes an organisation of vocations and the registration of vocational associations. It must be emphasised that the council shall imply no division or weakening of authority. It will give its advice on demand as well as on its own initiative, but the decision and responsibility shall always rest with the legislature. On the other hand, the council or

rather its committees will be a pillar of strength to the government in delegated legislation where, at present, the executive tends to go astray. It will envisage economic activity as a whole, not merely in parts as happens at present.

An Alternative.

If from any reasons the project of an economic council is found impracticable, the only alternative is the association of something like an Economic General Staff with the executive. Its members, thirty or forty in number, should be nominated by the government from the professions, economic chambers of various descriptions, labour and peasant unions, universities and technical institutions. The entire staff and its committees should discuss such proposals as might be placed before it by the government and should submit reports to it. It may also be authorised to make suggestions to the government on its own initiative. The staff may not be so influential as the economic council but it may counter-act the dangers of ignorance in the seats of authority. All over the world one of the crying needs of governments is that knowledge, both of principles and of details, should be utilized in the daily task of legislation and administration. An organisation such as the Economic General Staff might have prevented the mistaken exchange policy which in 1920 involved the Government of India in a loss of some forty crores of rupees.

Legislative Reference Bureau.

The Economic Council or the Economic General Staff, advisory in character, should be assisted, like the members of the legislature, by a legislative reference bureau which would guide the inquirer to files of debate, government publications, etc., on

any subject and which should also manage the Parliamentary Library. This Federal Bureau should co-ordinate the results of researches carried on under government auspices and the information received from consuls in other countries. Tried on a more modest scale, the Legislative Reference Bureau in Wisconsin in the American Union has more than justified its existence. In a vast country like India the Bureau must be organised on a bigger scale and placed under the direct supervision of a Minister. It should prove more and more useful as the volume of legislative business and the number of legislators and advisors increase.[1]

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1 See also Laski, *Grammar of Politics*, p. 364.

CHAPTER VI

THE FEDERAL EXECUTIVE

Popular Government admits of two divergent types of the Executive, the Presidential which obtains in the Federation as well as the states of the American Union and the Parliamentary which originated, like so many other political contrivances, in England, spread to the continent and has now been generally adopted. Under the former system, the President or Governor, elected directly by the people, holds office for a definite term of years, exercises the prescribed powers, and is not responsible to the Legislature on whose censure or confidence neither his resignation nor his continuance in office depends. It has well been said that a President need only keep alive to remain in office. Neither the President nor the Cabinet which he nominates has any seat in the Legislature or direct relations with it. Influenced by Montesquieu's doctrine of the separation of powers, the Americans hoped that this system would prevent the Executive from unduly influencing the Legislature in the manner in which the servants of George III were believed to have tampered with the integrity and independence of many members of the House of Commons. The object has partly been realised but it has been discovered that any separation of powers between the

Parliamentary Government.

Executive and the Legislature is far from natural. Public business admits of no such watertight divisions; it may at the same time be both executive and legislative or the one aspect may presuppose the other. In the United States the Legislature has been deprived of guidance and leadership; the Executive, not always sure of its ground has suffered in vigour and efficiency. The unity and harmony of Government have been destroyed; deadlocks and unfair compromises are too frequent. "The American system divides responsibility and makes it difficult to place it anywhere." If the system has not broken down, it is due partly to the sturdy political sense of the people and the operation of public opinion and partly to the institution of standing committees which bring the Legislature and the Executive into touch with each other. Nor can the Presidential system claim the credit of having closed the avenues to corruption. The legislatures of the majority of the American states have fallen a prey to the moneyed interests, the Lobbyists, the Rings and the Bosses of the professional party-politicians. Not even the Federal House of Representatives has altogether escaped the contagion. Perhaps the corrupting influence of money would have been felt in any case in the wealthiest country on earth. But it is probable that strong energetic Government leadership in the legislature might have substituted the force of loyalty or opposition to the Ministry for monetary influence and log-rolling. As it is, the American system stands condemned and has found no imitators among the new states. Even in the United States, many publicists have advocated that it should be modified and that Cabinet ministers should sit in the Legislature to supply knowledge and leadership and bring "team-play into the operations of government." As

it is, strong Presidents have actually managed to exercise a profound influence on legislation. W. H. Taft who himself held the office of President rightly emphasises that the presidential veto is an essentially legislative power.[1] It was used freely by Presidents like Jackson, Johnson and Cleveland. Woodrow Wilson succeeded through his proposals in stamping his personality on recent American legislation. It has always been necessary to depart from the strict theory of the constitution and to utilise standing Committees to serve as a bridge between the Executive and the Legislature.

The Parliamentary System.

The Parliamentary system, in which the ministry representing the majority sits in the Legislature and simultaneously obeys and controls it, has shown two variations. In England, in the Dominions and a few other countries, the king or his representative symbolises the unity of the State, calls upon party-leaders to form the ministry, formally assents to Bills and is supposed to transact all important business through his servants. But apart from legal formulæ, the head of the Executive wields influence rather than power and serves the great purpose of furnishing a stable, impartial pivot for the play of political forces. In several states, the president, though elected by the legislature or the people, fills exactly the same role. The French president, elected by a joint meeting of the senate and the chamber performs the task of selecting the Premier, when two or more leaders seem to command evenly balanced forces. Elsewhere, as for instance in Germany, the president elected by the people wields a little more power.

1 W. H. Taft, *Our Chief Magistrate and His Powers*, p. 14.

India should have, roughly, the British type of executive head, a Governor-General and Viceroy representing the King-Emperor, as at present, and holding office normally for five years. The extent of his actual powers will depend on the forthcoming political settlements, on the relation of the Government of India *vis a vis* the Government of England. If control over any departments is retained by the Secretary of State for India, that is to say, by the British Parliament, it will naturally be exercised by the Governor-General. Otherwise, the Governor-General should be content with something like the role which the King plays in England. The Imperial Conference of 1926 accepted the principle that in all matters including that of a grant of a dissolution, the Governor-General and Governors should conform to the practice followed by the King in England. Similarly, the power of disallowing or reserving Bills now seems to have been abandoned. It is, however, a mistake to suppose as an earlier generation of publicists were inclined to believe, that the King is a mere figure-head. The recent publication of the Diaries, Memoirs, and Biographies of English sovereigns and statesmen has conclusively proved that the King is by no means an insignificant factor in determining English policy and administrative trend. "There is not a doubt" said Gladstone, "that the aggregate of direct influence normally exercised by the Sovereign upon the Councils and proceedings of her ministers is considerable in amount, tends to permanence and solidity of action, and confers much benefit on the country."[1] The fact, however, must be

The Governor-General.

Influence, not Power.

1 Gladstone, *Gleanings*, I, 42.

grasped that the King exercises not *power* but *influence* which comes from his position, his ability, experience and detachment from Party. As Bagehot said, the Crown has three rights—the right to be consulted, the right to warn, the right to encourage. The French President, after the unfortunate ventures of MacMahon, has been approximating to the same position. He neither reigns nor rules, as Sir Henry Maine said. Casimir Perier, a holder of the office, complained that he had become a mere master of ceremonies. "It is a fundamental principle of the constitution" writes a French humorist "that the president shall hunt rabbits and not concern himself with affairs of State." But there have been presidents whose tact, sagacity, judgment have brought them tremendous influence.

Such influence on the part of the Governor-General, corresponding to that of the King in British politics, should always be welcome. A Governor-General of ripe experience drawn from the ranks of public life will, in any case, be able to influence the course of policy. But Dominion experience has revealed the danger of entrusting wide legal powers to the Governor-General and leaving it to conventions to regulate their exercise on the principles of responsible government. On the one hand, Governors have sometimes taken their stand on the letter of the law, stretched their prerogatives and commenced a bitter conflict with ministers, parliaments or public opinion. On the other hand, ministers have sometimes placed the Governor in false positions, pressed him to exercise his legal powers in their interest, shifted the responsibility for unpopular action to his shoulders, and dragged his name in party-controversy. Any number of illustrations can be cited from the

A Danger.

massive tomes of Dr. Berriedale Keith and the writings and speeches of Dominion statesmen and publicists. As late as 1926, Lord Byng, the Governor-General of Canada refused a dissolution to Mr. Mackenzie King, called the Leader of the Opposition to office, connived at some unconstitutional ministerial arrangements and then granted the new Premier an over-hasty dissolution.[1]

Conflicts of this character are only too likely to assume a racial complexion in India and must be avoided at all costs. It should be laid down that responsibility for policy, legislation and administration shall rest with the Ministers and legislature alone and they must bear the praise and blame without taking shelter behind the Governor-General. The English convention should be incorporated in the Fundamental Law. The Governor-General should, of course, be entitled to send messages to the Legislature. There will again be occasions when the Governor-General will have to exercise his discretion and impose his will on the course of events. For instance, the Governor-General would be within his rights in refusing a second dissolution on the heels of the first, to the Premier who had missed the expected majority. In normal times, however, he will be expected to act only as an influential adviser.

Similarly, the English Convention of selecting ministers should be invested with the force and sanctity of a constitutional law. According to the letter of the law, the Prime Minister and his colleagues are appointed by the King and hold office during his pleasure. In practice the leader of the majority in the House of Commons is uniformly asked to form a gov-

Election of the Prime Minister.

[1] For the whole incident see Keith, *Responsible Government in the Dominions*, Revised Edition, I, p. 146.

ernment. Bagehot who was the first to explain the real nature of the English system, explained that the Cabinet and the Prime Minister were appointed by the majority party in the House of Commons, from among their number. In the chapter on the Cabinet in his *Life of Walpole*, which is believed to have been inspired by Mr. Gladstone, John Morley defines the Cabinet as "a committee chosen by one member of the two Houses of Parliament from among other members." It is equally true to say that the House of Commons is the Government-making organ. The fact is that the majority of the Commons selects the leader who, when appointed Premier, selects his colleagues consulting the aspirations of the important individuals and sections of his party. Generally, the Cabinet secures a 'nice balance of interests.'

The convention has been applied in the Dominions but for long it did not work well and resulted in grave trouble. The Indian situation demands here again that the Convention be made part of the Constitution and, therefore, be uniformly adhered to. It should be laid down that the Prime Minister should be elected by the Assembly and that he should nominate his principal colleagues with the approval of the Assembly. There is nothing revolutionary about this proposal; it is but a method of securing the observance of the English practice; it has been tried in several countries and has, on the whole, worked well. Apart from Switzerland where the Legislature has long been electing the Collegiate Executive, there are the instances of the old Republics of the Transvaal and the Orange Free State, some of the present States of the German Republic and Ireland, which have formally vested the election of the principal ministers in the

The Transvaal and the Orange Free State.

Legislature. In the old Republics of the Transvaal and the Orange Free State, the President was chosen directly by the people, but the Volksraad (the Assembly) elected a majority of the Executive Council which advised the President and, in practice, also watched and checked him. Thus, the Transvaal Volksraad elected the State Secretary, the Superintendent of Native Affairs, the Keeper of Minutes and two other members but allowed the Commandant-General to be appointed by the President.

In unitary South Africa, the provinces enjoy very limited autonomy and are under Administrators appointed by the Governor-General-in-Council. But the other members of the Executive Committee are elected by the legislature in each of the four provinces. The Provincial Council according to Article 78 of the Constitution "shall at its first meeting after any general election elect from among its members or otherwise, four persons to form with the Administrator who shall be Chairman, an Executive Committee for the province. The members of the Executive Committee other than the Administrator shall hold office until the election of their successors in the same manner." Article §80 declares that the Executive Committee shall, on behalf of the Provincial Council, carry on the administration of provincial affairs.

The South African Provinces.

Prussia. On this point the Prussian Constitution, section V, lays down as follows:—

Art. 44, "The Ministry of State shall consist of the Minister-President and the ministers of State.

Art. 45. "The Landtag shall elect the Minister-President without debate. The Minister-

President shall appoint the other ministers of State.

Art. 46. "The Minister-President shall determine the general principles of governmental policy and shall be responsible for them to the Landtag. Within these principles each minister of state shall independently carry on the branch of administration entrusted to him and shall himself be responsible to the Landtag."

A later Article, 57 (1), requires the ministers, collectively and individually, to possess the confidence of the Landtag.

In Bavaria, according to section 58 of the Constitution, the Minister-President is chosen by the Landtag on the basis of a majority vote. He recommends a list of other ministers to the Landtag and, with its approval, appoints them. In case of a ministerial crisis the various parties hold a conference; a coalition is formed and names for the offices of Minister-President and ministers are agreed upon according to the relative strength of the parties in the coalition. The Würtemberg Constitution prescribes the same plan as obtains in Bavaria. Article 27 definitely lays down that after each election a new ministry should be formed. In Baden the Collegial ministry is elected and controlled at all times by the Landtag. The Constitution of the City of Danzig, framed under the auspices of the League of Nations, prescribes the election of the Executive by the Legislature (Article 25).

Bavaria.

Würtemberg.

Baden.

Danzig.

The Constitution of the Irish Free State (§52-53) institutes an Executive Council, the President of which

Ireland.

" shall be appointed on the nomination of Dáil Eireann (the Lower House) . . . . . The other ministers who are to hold office as members of the Executive Council shall be appointed on the nomination of the President, with the assent of Dáil Eireann . . . . ."

The plan of election will only stereotype the correct constitutional procedure, but it will present some import and incidental advantages. It will

The Working of the Plan.

place the Governor-General above the intrigues which everywhere accompany the efforts to reach high office. It will free him from the odium of deciding between competing claims of coalitions or individuals. It will prevent tactless Governors-General from " wangling " the Constitution and selecting ministers on personal preference. If the two-party system develops in India, the leader of the majority will almost automatically be elected Prime Minister. If there are several groups, they will generally be forced to form two coalitions on certain understandings and will agree beforehand on the choice of the Premier and the other Chief ministers. That there is some room for log-rolling under this scheme may be admitted but the fact is that no alternative scheme can get rid of it. In any case will coalitions form and settle their terms as to policy and personnel. Personal or group jealousies and rivalries there will be under any system but the plan here advocated has the merit of quickly bringing them to a head and forcing a compromise. After his election the Prime Minister will submit the names of the principal ministers to the House—names which, in practice, are likely to have

been agreed upon beforehand among the leaders of the coalition groups. Ministers in charge of the less important portfolios may be appointed by the Prime Minister without the express approval of the House. This method will guarantee the working homogeneity of the Cabinet.

Prime Minister.

In the cabinet there will be a well-recognised distance between the Prime Minister and his colleagues, which is likely to make for harmonious government. "No administrations are so successful as those where the distance in parliamentary authority, party influence and popular position between the Prime Minister and his colleagues in the cabinet is wide, recognised and decisive."[1] So writes John Morley, under Gladstone's inspiration. The Prime Minister should guide the general policy of the Government and specially keep in touch with the Foreign Office. The personal equation will determine the amount of supervision and control he may actually exercise on each Department. Not even Sir Robert Peel could direct policy in detail in these days of widespread administrative activities in the manner in which, by universal testimony, he ran the whole government a century ago. General supervision of policy however may reasonably be expected of the Premier.[2]

1 Morley, *Walpole*, pp. 164-65.

2 In France, the Premier is officially styled President of the Council of Ministers. In Canada, he is *ex-officio* President of the Privy Council of the Governor-General. In Australia he is President of the Executive Council. But since the Speaker of the Assembly is to be styled President in India, the term should not be applied to the Prime Minister.

The cabinet will be jointly responsible to the lower House and must resign on losing its confidence on any major issues of policy. For minor administrative acts, however, the Minister concerned alone will bear the responsibility and, if censured, resign. Nothing can altogether prevent the Ministerial practice of making anything a question of confidence and shielding delinquents. But the insertion of such a provision may go a long way to diminish the evil which is being deplored in England, in France and in other parliamentary countries. The Irish Constitution, Art. 54, expressly provides for collective responsibility.[1]

Responsibility.

The important portfolios should have Deputy-ministers corresponding to parliamentary under-secretaries in England, who should not be members of the Cabinet but should stand or fall with it. They must be selected by the Prime Minister, in consultation with his chief colleagues from among the elected members of either House. The Ministers as distinct from Deputy-ministers should be able to speak in either Chamber but should vote only in that of which they are members. The Deputy-minister may, like the minister, preside over the standing Parliamentary Committee of the Department concerned. The members of the ministry should be so distributed as to secure the representation of each of the important portfolios in either House. No rule can be laid down but it may be hoped that, as in other Federations, a convention will grow up to the effect that the ministry

The Ministry.

[1] For joint and individual ministerial responsibility and resignation on the demand of the legislature, *cf.* *The Constitution of the City of Danzig*, §56—58.

should be representative of the various provinces and communities. In the United States there has grown up a doctrine that the President should not have in a Cabinet two men from the same state. A Presidential Cabinet is essentially different from a Parliamentary one but the American convention may be borne in mind by future Prime Ministers and Legislatures in India.

The Cabinet.

Entrenched in the confidence of the majority in the Assembly, the cabinet should be able to drive a tendency through affairs and, subject to the constitution, direct all the forces of the state. It must be the centre of gravity in the Parliamentary system and must co-ordinate the Legislature, the Parties, the Governor-General and the permanent officials. It will command the initiative in legislation, supplies and appropriations and will become the pivot of public business. In practice parliamentary government is becoming everywhere the rule of the cabinet under the criticism and general supervision of the legislature. The leaders of the cabinet are marked out by the opinion of the party and derive their authority essentially from the same source as the parliamentary majority itself. In practice it is no longer a case of the cabinet being subordinate to the house. The two really check and control each other.[1]

1 *Cf.* Lowell, "The English system seems to be approximating more and more to a condition where the Cabinet initiates everything, frames its own policy, submits that policy to a searching criticism in the House, which after all this has been done, must accept the acts and proposals of the Government as they stand, or pass a vote of censure, and take the chances of a change of ministry or a dissolution."

There is just one danger which has to be guarded against. If India develops the group system instead of the two-party system, the cabinets must rest on coalitions, which may sometimes be too unstable. In France coalitions are constantly breaking up and reforming. It is true that there, or in other states similarly situated, a change of ministry does not imply a complete change of personnel. A number of the old ministers resume office with some new colleagues in place of those who have dropped out. "It has not been a choice between opposite poles but between more or less of the same thing." Nevertheless, the dislocation of policy is injurious to the public interest. In France, urgent reforms have hung fire for years and important programmes have never reached fulfilment. Nor have the Departments received adequate supervision. Short-term cabinets mean the ascendancy of permanent officials in the councils of the state. The remedy seems to be that the Ministry should be able to appeal from an inconstant chamber to the electorate. In France, the constitution requires the consent of the Senate to the dissolution of the Chamber before the expiry of its term. As a result, there has been but one dissolution and that too under very extraordinary circumstances at the hands of President MacMahon. The Indian Constitution should authorise the Prime Minister to advise the Governor-General to dissolve the Chamber in case he loses its confidence. A threat of dissolution always acts as a powerful check on legislators who receive allowances and who dread the prospect of election worries and expenses and the possibility of defeat in the bargain. In this manner the cabinet will be able to unmake the House just as the House will be able to

Dissolution.

unmake the Cabinet. So, either will try to accommodate itself to the other. The whole experience of Parliamentary government in the Dominions and in Europe proves that responsibility without the power of dissolution deflects the working of the machine. The Irish Constitution, Art. §28 and §53, lays down that the Legislature can be dissolved only on the advice of an executive which retains the support of the Dáil Eireann (the Lower House). But the arrangement is only too likely to perpetuate entanglements which, in the interests of legislature and executive harmony, should be quickly terminated. In many countries such as Poland, Austria and Czecho-Slovakia, the President can dissolve the Chamber with or without the concurrence of a specified majority in the legislature. In India it is desirable to keep the Governor-General's name out of controversy; so he should dissolve the Chamber on the advice of the Premier. In Collegiate Executives like those of Prussia, the Minister-President is generally entitled to demand a dissolution on the passage of a vote of no-confidence.[1]

Cabinet Secretariat.

In England, the cabinet or the Prime-Minister was, until recently, unknown to the law, but a few years ago, Mr. Lloyd George felt it necessary to establish a Cabinet Secretariat. The Indian Constitution must recognise the Cabinet from the start. The Cabinet should have a secretariat controlled by the Prime-Minister and the decisions, though not the discussions, should be duly recorded for reference.

1 *Cf. The Prussian Constitution*, Art. 57 (6).

It must be emphasised that the principle of the Cabinet system demands that, once formed, it should act as a unit. The British Cabinet, says Morley, "is a unit—a unit as regards the Sovereign and a unit as regards the Legislature. Its views are laid before the Sovereign and before Parliament, as if they were the views of one man. It gives its advice as a single whole, both in the royal closet and in the hereditary, or the representative, chamber. If that advice be not taken, provided the matter of it appear to be of proper importance, then the Cabinet, before or after an appeal to the electors, dissolves itself and disappears. The first mark of the Cabinet, as that institution is now understood, is united and individual responsibility."[1] So, an Indian Cabinet must act as a unit before the Governor-General, the Senate, the Assembly or the public. An individual minister who does not see eye to eye with his colleagues must, as in England, either subordinate his individual opinions or resign to make room for some one better able to throw his mind into the common stock.

The Cabinet a Unit.

The impeachment of ministers has fallen into desuetude in England but it figures in numerous constitutions as a necessary safeguard against ministerial misconduct. The English procedure of impeachment by the Lower House before the other is reproduced in several countries. Thus the Czecho-Slovak Constitution (Article 34) declares that the President, the Prime Minister and other members of the Government may be impeached by the Chamber of Deputies before the Senate.

Impeachment.

1 John Morley, *Walpole*, p. 155.

But elsewhere it has been modified and considerably improved by the substitution of the supreme Judicial Court for the Upper House.

The experience of France and other lands has shown that a provision for impeachment is necessary; its very existence may serve as a deterrent; only it should be hedged round by stringent conditions to prevent its abuse. The Court should try the charges in the usual judicial manner. It should be clearly laid down that no official can escape impeachment by resignation—a point which, as the Belknap incident in 1876 showed, is unsettled in the United States.

For the impeachment of the President or ministers the Polish Constitution requires a three-fifths majority in the presence of at least one-half of the statutory members of deputies. The cause is heard and judgment pronounced by the Court of State, "according to the rules of a special statute." Immediately upon his impeachment, the officer in question is suspended from office. No minister can evade his constitutional responsibility by resigning his office (Articles 51 and 59).

In France according to the Constitutional law of July 16, 1875, the President of the Republic as well as the Ministers may be impeached by the Chamber of Deputies before the Senate (Art. §12).

In the United States the President who by himself constitutes the executive, can be impeached by a two-thirds majority of the Legislature. Similarly, the constitution of every State in the Union provides for the impeachment of executive officers for grave offences, by the lower before the upper, a two-thirds majority being required for conviction. In the State of Nebraska alone is the impeachment to be made by a joint resolution of both houses.

The German Constitution (Art. §59) declares that "the Reichstag may impeach the President of the Federation, the Federal Chancellor and the Federal Ministers before the State Court for the German Federation for a culpable violation of the Constitution or of a federal law. The Bill of Impeachment must be signed by at least one hundred members of the Reichstag and must be carried by the majority prescribed for amendments of the Constitution. The details will be regulated by the federal law concerning the State Court."[1]

The Recommendation.

The Indian Constitution should lay down that a Bill of Impeachment signed by at least one-fifth of the members of the Assembly should be discussed on the floor of the House, that if approved by a two-thirds majority it should be referred to a Committee of Investigation and that if on the presentation of the latter's report it is approved by a two-thirds majority in the presence of a two-thirds quorum, the Assembly should have the power to institute proceedings against the Minister concerned before the Supreme Court of Judicature on grounds of treason, bribery or high crimes and misdemeanours. The cause should be heard by a full bench whose verdict shall be final.

The Permanent Officials.

To every portfolio will be attached a secretariat manned by permanent officials who will act as repositories of information and administrative experience and who will carry out the policy laid down by their parliamentary chief, the Cabinet, or the Legislature. Each department should be presided over by a Secretary and its main sections by Under-Secretaries.

[1] *Cf. The Prussian Constitution*, Art. 58; and *The Austrian Constitution*, Art. 142 ff.

These functionaries should hold office during good behaviour and should not change with the advent of a new ministry. The United States has paid heavily for the spoils system introduced a century ago by President Jackson, who replaced the old officials wholesale by adherents of his own party. As in England the Secretaries should enjoy the confidence of their chiefs and decline to betray it even to their successors. It is inevitable that a great deal of power should fall into the hands of the permanent officials. Ministers and parliaments may come and go but the permanent officials go on for ever. They devote their whole time to administration while a minister must spend long hours at the legislature and at cabinet meetings, and what is more fatiguing, attend to numberless "political" calls and social functions.

Delegated Legislation and Bureaucracy.

The vast extension of State activity has in modern times immensely increased the power of the permanent officials. Legislatures content themselves with passing skeleton Statutes, leaving the details to be filled in by the departments. Under modern conditions there is no alternative. Even in the United States where the Executive and the Legislature are supposed to be entirely distinct, the details of such important enactments as the Income-tax Law are entrusted to executive decrees. Dicey declared that "the cumbersomeness and prolixity of English Statute law is due in no small measure to futile endeavours of the parliament to work out the details of large legislative changes."[1] The eminent jurist advocated the French plan of working out, by means of executive decrees,

1 Dicey, *Law of the Constitution*, 8th edition, Introduction, p. 50.

the detailed application of the general principles embodied in the Acts of the Legislature. The rules framed by the permanent officials may be laid before the legislature and given the widest publicity but they scarcely receive any scrutiny. The combination of the expert and the amateur is of the essence of administration under a parliamentary regime. The one supplies principles, the other, details; the one, knowledge of the world, the other, technical skill. But everywhere the tendency is for the expert to increase his influence and power. He becomes the conscience-keeper of his chief. If the latter interferes in details, he can easily overwhelm him with interminable files and reduce him to impotence. The fact is that he is the standing embodiment of the maxim that knowledge is power. Knowledge in officials is always welcome but it is too apt to be narrow and a little old-fashioned. As a writer on English Governance puts it " a collection of experts is in many ways a dangerous assembly. It is apt to be stiff, pedantic, impracticable."[1] The delegated legislation, largely the work of permanent officials, has recently aroused some searching criticism in England. Lord Shaw, a great judicial authority remarks:—

" The form in modern times of using the Privy Council as the executive channel for statutory power is measured and must be measured strictly by the ambit of the legislative pronouncement. That channel itself . . . . . is simply the government of the day. In so far as the mandate has been exceeded there lurks the element of a transition to arbitrary government and therein of grave constitutional and public danger. The

1 For some further remarks on the power of permanent officials under delegated legislation, see Dicey, *Law of the Constitution*, 8th edition, Introduction, pp. xxxviii ff.

increasing crush of legislative efforts, and the convenience to the executive of a refuge in the device of Orders in Council would increase that danger tenfold were the Judiciary to approach any action of the Government in a spirit of compliance rather than of independent scrutiny. That way also would be public unrest and public peril."

In a recent article Prof. Morgan pointed out that in England "nearly every statute to-day is what is called 'skeleton legislation,'" that in 1920 or 1927, the proportion of Acts to Statutory Rules and Ordinances was 1 to 31; that a good deal of judicial power was passing from the Courts to Whitehall and that "it would be no great exaggeration to say that to-day political power has in practice passed from the Houses of Parliament to the Civil Service."[1]

Instruments of Consultation.

It is impossible to abolish bureaucracy, as the rule of the departments is called, in an age when technical knowledge and governmental activity are increasing beyond all precedent. One may as well think of running a school without teachers, a factory without mechanics and managers. Departmentalism has to be accepted as a fact; the problem is to provide against its inherent or accidental faults without impairing the efficiency of administration. In addition to the establishment of parliamentary supremacy and supervision, there are two lines on which reform can proceed. In the first place, administrative

1 The article in the *Evening News* was reproduced in the *Pioneer*, Allahabad, on the 13th of August, 1928. On the increasing power of public officials in England, see also Dicey, *Law of the Constitution*, 8th edition, Introduction, pp. xliii ff. See also Delisle Burns, *Whitehall*, pp. 9 ff., for permanent officials and delegated legislation.

centralisation should be abolished, that is to say, a good deal of autonomy—perfect independence within specified limits—should be granted to the provinces and thence to local self-governing areas. In the second place, the bureaucracy should be humanised, its mental horizon expanded and its attitude liberalised by association with the wider world. A series of instruments of consultation should be set up from top to bottom. Every department should be divided into Bureaux, each of which should be furnished with an Advisory Committee presided over by the Under-Secretary. It should be clearly understood that the Committee shall have no executive functions and its opinion shall not be binding on the Department or the Minister. The responsibility of the latter should remain unimpaired; the executive authorities and not the Advisers should be hanged when things go wrong. The Committee shall meet when summoned and quietly disperse when adjourned by the Secretary or Under-Secretary. The members shall be nominated by the Minister concerned. But Advisory bodies, if carefully selected, are sure to exercise considerable influence and counteract the baneful tendencies of officialdom. It may sometimes be desirable to have Provincial Advisory Committees alongside a Federal Committee, as for instance, in the Department of Railways, or in that of the Post Office, or Roads.[1] In France, advisory Commissions have served to bring together political administrative and lay elements together and have proved very useful.

1 *The German Constitution*, Article 93, lays down that "The National Ministry shall, with the consent of the Reichsrat, establish advisory councils for the national railway system to consult and cooperate in matters pertaining to railway traffic and rates."

Every Advisory Committee should include a few officials, a few non-official experts and a few representatives of general common sense. The influence of such an organised and talented body is likely to infuse the Administration with ideas and refresh its outlook. It will obviate those little mistakes which arise from an inadequate appreciation of public opinion and sentiment and which result in so much unpopularity and odium. On the other hand, the association with the Administration will be a training in itself to a large number of non-officials. Nothing else will bring so thoroughly home to them the difficulties of the Administration, the intricacy of the problems, the constant need of compromise, the essential conditions of efficiency. These men will then be able to guide public opinion on right lines. The informal training will prove of the highest utility whenever the members choose to enter local boards and provincial or federal legislatures. It may be hoped that in nominating the Committees the Government will make full use of those intellectual resources of society which at present hardly render any service to the administration at all. Universities, technical institutions and the ranks of industry, commerce and literature contain numbers of men and women who are never likely to aspire to administrative jobs or a parliamentary career but who will be ready to offer advice—principles, ideas, and practical suggestions—when asked for. In fact, the Administration can go further and endow research on its own behalf, leaving the academicians free to arrive at any conclusions and using as much of them as it thinks desirable.

The whole subject of Committees has recently been examined in England and some weighty opinions recorded in its favour. The Haldane Committee on the

Machinery of Government (Report, p. 12) said, " We think that the more they are regarded as an intergral part of the normal organisation of a department the more will ministers be enabled to command the confidence of Parliament and the public in their administration of the services which seem likely in an increasing degree to affect the lives of large sections of the community."

" Committees," says Sir Arthur Salter, " are an invaluable instrument for breaking administrative measures on to the back of the public. Modern Government often involves action affecting the interests and requiring the goodwill, either of large sections of the community or of the community as a whole. The action cannot be made acceptable without detailed explanation of this necessity, for which mere announcements in the press are insufficient. In such cases the prior explanation and the assent of committees of representative men who, if convinced, will carry assent of the several sections of the community who look to them as leaders, will be of the greatest possible value."[1]

" They cannot paralyse administration by shattering power into fragments; but they can fertilise administration by building the bridges necessary to its passage to the purpose at which it aims."[2] Properly utilised, these instruments of consultation will become creative institutions.

1 *The Development of the Civil Service*, p. 220.

2 On Committees see also *Psychology and Politics* by W. H. R. Rivers who scientifically analyses the behaviour of Committees and Bureaucracies. Also Laski, *Grammar of Politics*.

Another means of preventing the Administration from being devitalised, from falling into a monotonous rut, from becoming a mere impersonal machine is to encourage and organise thought among officials. The latter should be encouraged to arrange mutual consultations and think for themselves and should be permitted to publish the results of their inquiries. Freshness of outlook, originality of thought, and judgment should be taken into account at the time of promotion. The vow of silence, generally imposed on permanent officials, should be broken and their minds allowed freedom of thought and expression. They may not reveal official secrets nor indulge in controversial party-politics but subject to these limitations there are vast fields of social and political thought and administrative planning, which can be cultivated by the civil services with profit. The history of administration makes one thing absolutely clear. The success of policy depends on the consultation of the interests affected, of the use of all available knowledge and experience and thinking on a large scale. The Civil Service recruited from the ranks of brilliant University men should realise itself as a learned profession.[1]

Organisation of Thought among Officials.

Into the details of Departmental organisation it is unnecessary to enter here. Only a few isolated points may be stated. The service should mainly consist of two sections—the higher or administrative and the lower or clerical. For both there ought

Departmental Organisation.

1 Sir William Beveridge in *The Development of the Civil Service*, p. 242. See the whole series of lectures for the status of the Civil Service.

to be separate open competitive examinations, the former being restricted to University graduates and demanding only general intellectual grounding of a high level, while the latter may require some special skill and be open to those also who may possess lower educational qualifications. This lower section may be split into several grades, each recruited by a separate examination demanding special qualifications. There should be rules of promotion from one grade to another of this section, but passage from the lower to the higher section should be rare. The highest permanent officials—the Secretaries and Under-Secretaries—may be selected generally from the Civil Services but may, for special reasons, be recruited, for life as usual, from a wider circle.[1]

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[1] *Infra*, Ch. VIII.

CHAPTER VII

THE PROVINCES AND LOCAL BOARDS

The Provincial Constitution.

Subject to the Federal Constitution which for all purposes shall rank as the Supreme Fundamental Law, a Province[1] should have a constitution detailing the organs of government and their duties including the status and powers of local boards, and also specifying certain imperative duties, like the promotion of education, sanitation and facilities of communications to which they must apply themselves.[2] Within the terms of the Federal Constitution, a Provincial Constitution may be altered by the Provincial Legislature by

1 On the position of the Provinces since 1858 see *supra*, Ch. IV; also Mukerji, *Indian Constitutional Documents*, 623—38, 651—67; Hunter, *Life of Mayo*, II, 42, 54-55, 62, 79; Chesney, *Indian Polity*, 84—88; *Report on Indian Constitutional Reforms*, paras. 200—211.

2 *Cf.* Article 6 of the *Constitution of the United States*, which lays down that the Constitution and the laws of the United States which shall be made in pursuance thereof . . . . shall be the supreme law of the land, and the judges of every State shall be bound thereby, anything in the Constitution or laws of any State notwithstanding.

majorities of two-thirds in the presence of a quorum of two-thirds in two successive sessions separated by a dissolution and a general election. Province-members of the Federation will thus function as autonomous states. They may, however, continue to be called Provinces to distinguish them from any State-members of the Federation. The Provincial, along with the Federal, Constitution must be obeyed by the Provincial Legislature and Executive, by all district officials as well as by local boards, on pain of their statutes and actions being declared null and void by the courts.

There has been a tendency in the States of the American Union to treat the Constitution as a mere instrument of direct legislation. All sorts of trivial provisions are lightly inserted. In the Indian provinces this tendency will be counteracted by vesting the power of amendment in two successive legislatures; a dissolution, always unwelcome to members, will not be lightly resorted to.

The Provincial Constitution need not repeat the Fundamental Rights and Guarantees of the Federal Constitution which, *ipso facto*, shall be binding on it. It may, however, provide for the removal of any flagrant social injustices peculiar to a province. It should prescribe the character of the Legislature and the method of its composition. The decisive reasons for the establishment of a Second Chamber in the Federation do not apply to the Provinces. Provincial subjects, though very important, will not be so delicate as to require a regular second chamber for legislative revision. Provinces are not to be federal structures and shall have no sub-provinces to serve as the basis for an Upper House. After

The Provincial Legislature.

The Problem of a Second Chamber.

rejecting the bases of birth, rank, property and education, it does not seem possible to hit upon a plan which will secure an Upper Chamber different from the lower. The subsidiary objects served by the former can with a little change of procedure be entrusted safely to the House itself or its committees. The Constitution (Art. 86) of the unicameral Jugo-Slavia provides that every law must be submitted to a double vote in the same session before its final adoption. Finland provides that at the third reading a bill can, at the instance of a single member, be postponed until the next sitting when, on the demand of one-third of the members, it can be further postponed until after the next elections. In the Indian provinces, the Jugo-Slav plan can, if so desired by the people, be adopted as an amendment of the Constitution. Besides, standing committees should thoroughly revise every project of law. As to checks and balances, the two Constitutions binding on the provinces, the presence of the opposition—a ready-made alternative Government—and public opinion should prove enough. The experience of second chambers in the States of the American Union has not been eminently happy; for such revision as they have performed, a heavy price has been paid in dead-locks and inefficiency. The latest surveyor of American Government thus sums up the results of the bi-cameral system in the States. "It increases the cost and the complexity of the law-making machinery; it facilitates, even actively encourages, the making of laws by a process of compromise, bargaining and log-rolling; it compels all legislative proposals to follow a circuitous route on their way to final enactment; it provides countless opportunities for

obstruction and delay; and it makes easy the shifting of responsibility for unpopular legislation. Finally, it has proved a barrier to the planning of the laws."[1] Add to this that, the state senates, small in numbers, have proved easy to bribe. It is significant that the "Model State Constitution" prepared by the National Municipal League which has attracted wide attention in America envisages a single-chambered legislature. The double-chamber system which obtained in American local government has been rapidly falling into desuetude. It has finally disappeared from a large number of cities, including the twelve biggest ones, each of which is more populous than some of the States which by mere force of tradition, as American writers admit, still cling to the two-chamber system.

In Switzerland the Cantons have single-chambered legislatures. In Canada, only two provinces, Quebec and Nova Scotia have second chambers. In South Africa none of the four provinces has a second chamber. In Australia, the upper chambers in four of the States are elected on a low property qualification. They cannot be pronounced undoubted successes. The Indian Provinces should, therefore, start with single-chamber legislatures. If, in future, any of them feels a revisory chamber to be indispensable, it should be authorised to set up a second chamber after the Norwegian pattern. The Legislature, at its first sitting, should elect a Committee of 30 members to act as a Second Chamber, with power to discuss all matters, to revise all bills and propose amendments, though the Lower House will always be free to accept or reject such amendments. Such a revisory

1 Munro, *Government of the United States*, pp. 459-60.

chamber alone seems possible in the provinces and that, too, need be established only if experience clearly indicates its need. The power of setting up a chamber of this description and exactly defining its functions should be vested in the provinces and should be liable to be exercised through an amendment of the Provincial Constitution. The Upper House, wherever set up, may be called Select Chamber while the Lower, for the sake of continuity and distinction from other bodies, Provincial or Federal, may continue to be called Legislative Council.

The Legislative Council.

The Legislative Council should always be elected on the franchise of the Federal Assembly and hence on adult suffrage at the latest after ten years. There ought to be the same territorial basis of constituencies and the same guarantee of proportionate representation to minorities in case of their failure to win more seats. The powers, privileges and procedure of the House should correspond to those of the Federal Assembly. The remuneration of members may be fixed on a lower scale but there should be the same privilege of free travel on railways within the constituency. The system of Committees—Standing Committees, Committees of Investigation as well as the Recess Committee—should obtain as in the Federation. The sittings of the Legislature should be public unless a two-thirds majority decides otherwise on the motion of at least one-fifth of the members present. On all Private Bill legislation, the procedure of the British Parliament should obtain. The numerical strength of the Legislature must vary from province to province. Small populations cannot always be expected to supply an adequate number of able persons to man big legislative

chambers. Leaving out a few uncertain seats, the strength of the Provincial Legislatures and the distribution of seats at present are as follows:—

Composition of the Provincial Legislative Councils

Provinces	General.	Communal.	Landholders.	University.	Commerce, Industry and Planting.	Representation by nomination.	Officials.	Totals.
Madras ...	61	18	7	1	6	6	19	118
Bombay ...	46	29	3	1	8	6	18	111
Bengal ...	41	37	5	2	15	5	20	125
U. P. ...	57	28	6	1	3	5	18	118
The Punjab	18	36	4	1	2	6	16	83
Bihar and Orissa.	46	18	5	1	3	9	16	98
C. P. ...	40	7	3	1	2	5	12	70
Assam ...	19	12	2	1	6	5	9	53

The Recommendation.

On the principles governing the scheme unfolded in these pages, this chart will be considerably simplified. There will be only general constituencies. As already argued, neither property nor education needs or deserves special representation. A certain weight-

age may be given to towns as such, since they must form centres of life for all sections of the community. But all special constituencies, including those of the Universities, should be abolished. The number of the Councils should range between 300 in the most populous province to 100 in the least populous of the major provinces. Small territories like Ajmer-Marwara and Coorg should have a Council of about twenty-five persons. Every province should have an Economic Council or an Economic General Staff modelled on the corresponding federal institution. The Federal Capital should have no legislature of its own. In the United States the District of Columbia which contains Washington does not enjoy the privileges even of a Municipality and has not even got the franchise for Federal Elections. It is significant that the Australian Federal Capital is being shifted from Melbourne, the centre of a state, to Canberra which is to be exclusively under Federal control. In France, Paris has not received even such limited self-government as other French towns and communes in general enjoy. In India, Delhi may have a municipality like every other town, but to raise it to the status of a province and endow it with a legislature may create difficulties. Discontent with its provincial government may react on the Federal authorities. Many of the buildings in the city will belong to the Federation and the means of communication will have to be controlled by the Federal authorities. Delhi, then, should be placed directly under the Federal government; its municipality should be established by a Federal statute and be controlled by a Bureau of a Federal ministry, say, that of the Interior. The latter should likewise appoint the execu-

The Capital.

tive commissioner of the Metropolis. It is desirable that, as already argued, the capital should consist only of the city and its environs, and that no district be attached to it.

The Provincial Executive should, in principle conform to the Federal Executive. The Governor should be appointed by the King and should correspond to the Federal Governor-General. On this point Canadian practice varies from the Australian. In the former which does not recognise provincial independence, the Governor is appointed by the Governor-General, in practice by the Federal Cabinet which generally selects leading party politicians. Australia which has followed the American pattern requires the State-Governors to be appointed by the King, that is, in practice, by the Prime Minister of England; but the latter usually consults the wishes of the Australians themselves. The position assigned to the Indian Provinces under the present scheme will accord only with the appointment of the Governor by the King. The Governor, appointed for five years, should play the role of a constitutional monarch, advising, warning, encouraging but never shouldering responsibility. The Legislature and the Ministers must bear all praise or blame at the bar of public opinion and should never drag the Governor's name into political controversy. It is desirable to incorporate all this in the constitution, since the annals of Dominion provinces are full of heart-burning and dead-locks between the Governors and Ministers or Legislatures. The mistake of leaving much to conventions will have doubly serious consequences in Indian provinces.

The Provincial Executive.

The Governor.

The Chief Minister, as the head of the Provincial Ministry may be called for the sake of clear distinction from the Federal Prime Minister, should, as in the Federation, be elected by the Legislature and should nominate his principal colleagues with the approval of the Legislature. The chief-minister should appoint deputy-ministers, whenever necessary, from among the elected members of the House. The cabinet must act as a unit and be jointly and severally responsible to the Legislature, with the power to advise the Governor to dissolve the House. The provisions for the impeachment of ministers by the Legislature before the High Court should correspond with those already sketched in the case of the Federation. To the Bureaux of each executive department there should be attached Advisory Committees, consisting of officials and non-officials. The number of such committees will be very large in the provinces whose governments are to administer most of the services vital to the welfare of society. For instance, the Departments of agriculture, irrigation and industries will require numerous provincial as well as local advisory committees. As for education, Universities and Boards should be invested with large powers of self-government; but some Provincial Committees on Primary, Secondary, Higher and Technical instruction, on Libraries, Museums, etc., in addition to individual local managing committees should prove useful, for purposes of co-ordination and enlisting ideas. The recruitment, promotion, and divisions of the services should follow the lines already sketched in connection with the Federal Executive. Similar efforts should be made to encourage thought among officials.

The Ministers.

Provincial autonomy carries with it the right to organise the public services on a provincial basis. In regard to subjects of concurrent jurisdiction, the Provincial Services must perform such duties as may be delegated by the Federation and must submit to Federal control and supervision. In order to secure inter-provincial co-ordination the Federation shall have the right to prescribe the number, gradation, status, emoluments and functions of services engaged in departments of concurrent jurisdiction and shall share the cost in the proportion settled by an official committee with a majority of Federal representatives. Whenever necessary, federal and provincial revenues may be collected by the same machinery, the costs of collection being shared proportionately between the two governments. All provincial accounts should be audited by Auditors who shall hold office during good behaviour, whose salaries shall not be reduced during their term and who shall be removable only on an address presented to the Governor by at least a two-thirds majority of the Legislature.

Miscellaneous.

The Supreme Fundamental law should prescribe that every district[1] in every province should have an Advisory Council. In France and Italy, the prefect has elective councils associated with him. The German district committee (Berzirksausschus) had also a tincture of representation by election but these areas have no other organs of self-government. In view of elective district boards in India, the pro-

The District.

Advisory Council.

1 On the Indian district, see in particular, Hunter, *Indian Empire*, p. 513; *Directions for Collectors, N. W. P.*, p. 184; Chesney, *Indian Polity*, 168—83; Strachey, *India, its Administration and Progress.*

posed Advisory Council should not be elective at all. It should consist of officials and non-officials, nominated for a fixed term of years, by the District Officer. In no sense of the term should the council be elective, lest it should arrogate executive authority and impair administrative efficiency; but the district officer may be expected to nominate persons from various sub-divisions and various classes. The number may range between ten and forty at the discretion of the officer and according to the size of the district. The Council should meet at least once a year and as oftener as summoned by the District Officer to offer advice on any matters referred to it and to present suggestions emanating from any individual members. The District Officer shall always be free to reject, accept or modify its suggestions, but there need be no doubt that its opinions will carry weight. It will serve to humanise the district administration, to keep the officials informed of public sentiment, grievances and requirements and to suggest reforms.[1] It will at the same time serve to bring the difficulties of the administration home to some prominent people, to make them understand the executive stand-point, in short, to provide some useful training to men who may be expected to lead local opinion. Even at present every district officer tries to consult many individuals on questions of public importance and occasionally calls informal conferences. The waste of time involved in this irregular, haphazard consultation will be obviated by the institution of a regular Advisory body, consisting of fairly prominent and representative persons. Often does a district officer get tired

1 On District Advisory Councils, see also G. K. Gokhale, *Speeches*, pp. 481—91.

of the type of man who thrusts himself on him and offers gratuitous advice with ulterior motives of his own. An advisory council will provide a steady body of dignified public-spirited men. It may be added that service on the district councils as on all other Federal or Provincial advisory committees shall be honorary, though travelling and halting allowances should be paid to all, so as to enable poor men to serve. This extension of the principle of organised consultation is of the very essence of constitutional reform and should be incorporated in the Constitution. It offers the only means of democratising the use, without diminishing the efficiency, of such power as must, in spite of all autonomy, federal, provincial or local, fall into the hands of permanent officials. The principle of consultation, by the way, accords with the whole trend of ancient Indian political tradition which always laid the greatest stress on it and organised regular instruments for it.[1]

Local Self-Government.

No scheme of self-government can be complete or effective which does not bestow large powers on elective boards in towns, districts, sub-divisions and villages. In the very nature of things, local affairs touch the masses of the people most directly and intimately and enlist the keenest interest. Here democracy can function in its full vigour. Here alone can the people as a whole be trained in habits of co-operation, compromise and self-rule. Here they can understand that eternal vigilance is the price of liberty and that

Training in Self-rule.

[1] See my *Theory of Government in Ancient India* and *State in Ancient India*.

some sacrifice of time and energy in the common cause is the *sine qua non* of a good life. One of the reasons of the egregious failure of democracy in Latin America was the absence of municipal and village self-government. Conversely, the vigorous local institutions have been the chief cause of the success of democracy in Switzerland. As early as the thirties of the last century, De Tocqueville (*Democracy in America*) perceived that in the local self-governing areas did the people of the United States learn the use of freedom. From the administrative point of view, members of local boards will be best acquainted with the local needs and limitations, local aspirations and prejudices and, given integrity and capacity, may be expected best to serve their areas and promote their moral and material progress. France has paid heavily for concentration. Paris sometimes does too much and sometimes too little for the Departments and generally delays all matters. Sometime ago an official had to wait two years for permission to buy a box of pins, the request passing through 25 or 30 officials one after another. Instances can be multiplied. Now the telegraph, the long-distance telephone and the wireless have intensified the evil of interference. Regionalism is at present one of the strongest reform movements in France.

Administrative Convenience.

As the present writer and others have tried to show in their historical works, local self-government, formal or informal, was the strongest point in ancient Indian governance and imparted a singular vitality, and stability to Indian social and cultural life. The South of India enjoyed, a thousand years ago, a system of local self-government, which, in organisation, in range

Historical Reasons.

of functions and in intensity, might challenge comparison with any the world has ever seen. The North was not equally advanced but here, too, local self-government, often informal, but none the less real in type, was the order of the day. During the Middle Ages, the policy or the weakness, the benevolence or the indifference of the rulers left the rural areas pretty much to themselves in matters of justice and the amenities of life and allowed a high degree of self-government. Local self-government, then, is in perfect harmony with Indian tradition; its remnants and memories still survive; the habits of mind it requires are still to be found and can be fostered into full strength. It is needless to trace here the modern history of local elective boards.[1] Suffice it to say that the Governor-Generalships of Lords Ripon and Hardinge mark notable epochs. In 1918 the Montagu-Chelmsford Report (Para. 188) declared that complete popular control was to be established in local boards as soon as possible.

The Problem of Local Self-Government.

The problem of local self-government, particularly in the big cities and large local areas, is the problem of combining sustained popular interest with integrity and efficiency of administration. The experience of the United States where the majority of the city-corporations are corrupt and where some

1 See in particular, Mountstuart Elphinstone, *Official Writings*, ed. Forrest, pp. 337—52, *Fifth Report*, p. 85; Holt Mackenzie, *Minute*, 1st July, 1819; *Report of the Decentralisation Committee*, para. 405; Resolutions of the Government of India, dated 26th of April, 1915, and 16th of May, 1918; *Report on Indian Constitutional Reforms*, paras. 192—95; K. T. Shah, *Constitution and Functions of Indian Municipalities*.

are the very sink of iniquity[1] is a warning to all that there are pitfalls on the way. In local boards it has been said, "the game of politics centres round small issues and thus circumscribed in scope, loses the ethical value of scale." The ultimate remedy lies here as elsewhere in a sound, alert, instructed public opinion and a high level of general character. But constitutional remedies can be provided to forestall and neutralise some of the dangers that lie ahead. In the first place, the powers of local boards should be large enough and their functions important enough to attract men of ability and public spirit. The marvellous progress in German municipalities is largely due to the wide powers conferred on them.

It is desirable that local self-government should as far as possible be unified and entrusted to a single body in a single area. In England, a different policy or a lack of policy was followed. "For almost every new administrative function, the Legislature has provided a new area containing a new constituency, who by a new method of election choose candidates who satisfy a new qualification, to sit upon a new board, during a new term, to levy a new rate and to spend a good deal of the new revenues in paying new officers and erecting new buildings."[2] The resulting waste and confusion have recently provoked a reaction.

In the second place, the Provincial Government should be able, through its departments of Local self-

1 *Cf.* Bryce, *American Commonwealth*, I, 641 ff., II, 111 ff., 379 ff. (chapters on the Tammany Ring in New York; the Philadelphia Gas Ring and Kearneyism in California, Local extension of Rings and Bosses).

2 *Local Administration*, Imperial Parliament Series, p. 14.

government, Education, Sanitation and Public Works, to furnish real advice, guidance and direction to local bodies and to co-ordinate their activities whenever necessary. John Stuart Mill said, that "Power may be localised, but knowledge, to be most useful, must be centralised; there must be somewhere a focus at which all its scattered rays are collected, that the broken and coloured lights which exist elsewhere may find there what is necessary to complete and purify them. To every branch of local administration which affects the general interest, there should be a corresponding central organ, either a minister or some specially appointed functionary under him . . . .

"It ought to keep open a perpetual communication with the localities; informing itself by their experience and them by its own; giving advice freely when asked, volunteering it when seen to be required, compelling publicity and recordation of proceedings, and enforcing obedience to every general law which the legislature has laid down on the subject of local management."[1] Here control cannot altogether be unified but there is no

1 Stuart Mill, *Representative Government*, 2nd edition, p. 291. For some valuable information on modern experiments and projects of Local Administration, see the *Journal of the Institute of Public Administration*, *i.e.*, Vol. VI, No. 3, July, 1928; Munro, *Government of American Cities; Government of European Cities;* Redlich, *Local Government in England;* Webbs, *Local Government*, etc.; R. M. Story, *American Municipal Executive;* H. G. James, *Local Government in the United States;* R. H. Porter, *Town and County Government;* Ashley, *Local and Central Government.* The annual reports of cities, particularly of those in the United States, are crammed with information.

reason why it should be spread out over so many departments as in England. The absence of adequate centralisation of control in American local government has proved more than disastrous.

The Provincial Government should have the power to suspend boards which are persistently corrupt or incapable. In the towns such boards should be succeeded by a commission of four or five or a single city-manager elected by the people or nominated by the Provincial Government as the latter thinks fit. The commission plan originated in the United States in the city of Galveston which, after partial destruction by a tidal wave in 1900, was unwilling to entrust the task of reconstruction to the old corrupt, complicated municipality of the Mayor-Council type. Instead, it obtained permission to appoint five Commissioners and entrusted its affairs to their care. The resulting efficiency led to the perpetuation and extension of the plan until by 1914 it had been adopted by more than 400 cities. Recently, there has set in a reaction against it but it still persists in vigour. The City-Manager Plan, which is approved by Lawrence Lowell, originated in Dayton after the town had been inundated by a flood in 1913. The voters elect a Council of five or seven members who appoint, or " hire " as they say, a Manager to perform administrative duties. The device has proved meritorious and now obtains in more than 300 cities. The supreme disadvantage of these plans is that they seriously diminish popular interest in municipal affairs and the educative value of local self-government. They should be resorted to when Municipal Government of the ordinary type has definitely failed. As an emergency measure, the Provincial Government should be empowered to do away with election altogether and itself to

appoint a Commission or Manager. In the case of persistently corrupt or incapable District, Sub-divisional or Taluka boards, the administration should temporarily be made over to Government officials associated with nominated advisory committees. All along it should be understood that these measures are to be regarded as exceptional and are to be withdrawn in favour of normal self-government as soon as practicable. Regulations to this effect should be inserted in all Provincial Constitutions, and supplemented by detailed Provincial statutes.

In the third place, patronage should, so far as possible, be taken out of the hands of the chairman or the members of boards and left to be determined by examinations conducted by a Public Services Commission. As the sequel will show, the interests of elective representatives and officials no less than those of the public prescribe that open competition is the only safe avenue to public employment in a democracy. In the fourth place, it should be laid down that contracts should be called by the widest advertisement, that all tenders received should be published and that they should first be examined by committees and then laid for approval before the boards.

The Functions of Local Boards.

The functions of municipal and district boards should comprise primary instruction both for children and adults of either sex, higher and technical education where feasible, establishment and management of libraries and museums, provision or regulation of theatres, cinemas, circuses, music halls and other means of entertainment, public parks, flower shows, pleasure gardens, sanitation, public health, vital statistics, hospitals and dispensaries, roads, tramways,

motor-buses, traffic, street-lighting, gas and electricity, water-supply, provision for pure milk, drainage, erection of model houses and tenements, town improvement, control of traffic, fire-brigade, etc., etc. The Police should be entrusted sparingly to local boards; a contrary policy has led to gross corruption in the United States. Some of these activities such as the supply of gas and electricity, water, and milk, housing, tramways, theatres, etc., should, after the capital charges have been paid off, bring a decent revenue to the boards. Municipal trading is no longer a debatable question; it is now an established policy in Europe and America and has also been introduced in India. For education, sanitation, communications, drainage, etc., a local board should receive grants from the provincial government. It should be able to levy cesses and petty taxes as a further source of income. For the rest it should be able to go to the market and raise loans at such rates of interest as may be approved by the Provincial Government. All this should be incorporated in the provincial constitution. Provincial statutes should serve as the charter of local self-government and should be binding on all boards, any breaches thereof being liable to correction by the courts, as well as by the provincial government. Any special powers may be obtained by means of private Acts to be promoted in a semi-judicial manner as in England. The committee system should be further developed in all boards, urban or rural. As in England, the committees should keep in touch with the permanent officials. In the big towns the Municipal Corporation should be authorised to set up ward councils for the performance of specific duties. In the districts, there ought to be boards on similar lines in talukas, town-areas and notified areas.

A Board should be elected for three years but care should be taken that local elections do not coincide with Provincial or Federal elections. The issues of the latter should not, so far as possible, be allowed to enter local affairs. If once local elections are fought on provincial or federal party lines, they will fall into the hands of party-managers, as in the United States, and the flood-gates of corruption will be opened. The practice of holding all the elections simultaneously in America confuses the voter and reduces the show to a farce. The British practice of timing the local and national elections at different times has proved extremely satisfactory. In India a further precaution may be taken and the various triennial General elections placed at the start in different years so that, ordinarily, they will rotate apart. As already remarked, the suffrage should at the latest within ten years be extended to all men and women —otherwise not disqualified—above twenty-one. In the meanwhile, it may be somewhat wider than the Federal and Provincial franchise and, with the advance of adult education, should broaden at each subsequent election until the process is complete.

The Elections.

The village, the inevitable unit of society in an agricultural country,[1] has to be endowed with as large a measure of power and responsibility as is compatible with efficiency. Fortunately, the psychological factors and historical traditions are favourable to experiments in village democracy. The people of a village or a cluster of neighbouring villages naturally regard themselves as

The Village.

1 At present in India, 73 per cent of the population is agricultural; another 17 per cent dependent on agricultural economy for their living are resident in villages.

a single community. All the inhabitants know one another; they must have the same interests and grievances; they can easily co-operate in common concerns. Informal co-operation there has always been. In ancient and medieval India it was more or less organised. The concentration, energy and efficiency of the British Government, however, ended the judicial and police functions which the villages had been partially discharging. Nevertheless, the village remains a living unit. Village self-government can be reconstituted and organised on plans better than ever tried before. Here direct or primary democracy, as distinct from representative democracy, can be adopted for certain purposes. Here for other purposes we can from the start establish adult franchise. People who know one another intimately cannot in their mutual affairs be deceived by canvassers. Aristotle, whose insight into politics has yet to be surpassed, remarked that "the best material of democracy is an agricultural population; there is no difficulty in forming a democracy where the mass of the people live by agriculture or tending of cattle."[1]

Village Primary.

Once every year all the adult inhabitants of a village, or a cluster of very small villages, should meet together and elect a Panchayat of, say five or seven members and its President. They may also elect committees for education, sanitation, foot-paths, parks, pleasure grounds, or libraries, etc., to work under the general guidance of the Panchayat. The term for all offices and committees should be a year, though individuals should be eligible for re-election. It may be hoped that offices would rotate and an approach would be made to the

1 *Politics*, VI, 4.

Aristotelian ideal of citizenship as participation of all in actual administrative work. The Panchayat and Committees should forthwith busy themselves with framing budgets and general policy, which should be discussed at a second, following close on the first, meeting of the Primary. It will be for this second session to sanction such fresh taxation as may be necessary to supplement the grants from district boards and from the government. The supplies should be appropriated to various heads. Within the framework of the Village Panchayats Acts, the lines of policy in education, sanitation, etc., should be laid down. After another four or five months the Primary should meet in its third session to take stock of the situation, to receive reports, written or oral, from the various committees and pass any resolutions. A vote of censure, carried by a two-thirds majority, should mean the resignation of the committee, its officials or members, and fresh elections should be held. The Primary may meet again on the requisition of twenty per cent of the adult inhabitants of the area, but normally three sessions a year should prove adequate. The Panchayat should appoint a panel of honorary judges, irremovable by the Primary to ensure their independence, to try such suits as may, by provincial legislation, fall under village jurisdiction. In certain specified classes of such suits, an appeal should lie from village justices to regular tribunals. It must be stressed that judges should in no case be elective and not be responsible to the Primary. They should hold office for a year but should be eligible for re-appointment by the succeeding Panchayat. They should hold no other office or membership of any committee during their tenor on the village bench, and should thus be free from entanglements and contro-

versies which may compromise their independence or shake the confidence in their impartiality. Besides, a separation of executive and judicial functions is as desirable in the village as in the larger areas. To sum up, the Primary, meeting at least thrice a year, the annual elective Panchayat and various committees, annual justices appointed by the Panchayat should form the regular frame-work of village self-government. A large number of adults are likely to participate in actual administrative work under this scheme. Though living in villages, they will be citizens in the fullest Greek sense of the term.

Units of local self-government may be permitted by the Minister concerned or the Legislature to form combinations for the accomplishment of specified tasks in common. (*Cf.* the Polish Constitution, Article 65.) In any case, it is essential that local bodies should pool their resources of knowledge and experience and think out policies in common. It need hardly be added that every village primary, committee and official must respect the Supreme Fundamental Law, the Provincial Constitution and relevant statutes and must not under any circumstances violate the guaranteed rights of individuals or groups. The village authorities, like others, will be liable to be sued in the ordinary courts, for exceeding their powers.

Combinations.

In its initial stages, the scheme of village self-government will require the tending care of district officials and of district boards who must ungrudgingly place their advice and experience at the disposal of the village folk. District Boards which make grants to village authorities should be entitled to inspect the arrange-

Guidance.

ments for education, sanitation, etc., and suggest improvements. In case of gross, persistent maladministration, the district officer with the approval of the Provincial Government, may suspend the village institutions, but they should, as early as circumstances permit, be restored. Once a scheme of real village self-government has come into full vigour and working order, it will awaken the latent political capacity of the people, develop the judgment, train the whole nation into habits of orderly self-rule and make all higher elections an expression of the instructed conscience of the community.

CHAPTER VIII

THE JUDICATURE

It is not an invariable practice for written constitution to bestow on courts the right to interpret their provisions and to refuse the enforcement of statutes which in their judgment contravene the Fundamental law. The French Constitution, for instance, specifies the powers and relations of the various organs of government but if the legislature enacted a statute violating any clause of the constitution it would still be valid. Far from questioning its authority, the courts must enforce it. The point was settled sometime ago when the Proprietors and Publishers of the *National*, tried without a jury according to a law of 1830, appealed on the ground of the violation of their constitutional rights. The court of Cassation held that a law deliberated and promulgated according to the constitutional forms prescribed by the Charter could not be attacked as unconstitutional. Duguit, indeed, still maintains that the Declaration of Rights enshrined the contract of a new society, that it has a permanent character and that it is superior to constitutions themselves. But so far as practice is concerned, the other great French jurist Esmein is right in holding that the Declaration has no legal force and never had more than a dogmatic value. However, it is

Written Constitutions and the Courts.

France.

significant that eminent publicists like Maurice Haurion and Gaston Jeze advocate judicial control and that two parties—the Action Liberale and the Progressists—have given it a place in their programmes. Since 1907, the French Courts have claimed the right to pronounce on the validity of the delegated legislation framed by the executive to fill in the details of the skeleton statutes in exercise of powers clearly conferred by the Legislature. Still, an Act duly passed by the Chamber of Deputies and the Senate and duly promulgated by the President of the Republic would be binding on the Courts however violently it may be denounced by opposition politicians as unconstitutional. In Switzerland the Legislature is the judge of its own powers and its statutes cannot be questioned by any court. As a result, federal laws are generally presumed to be higher in authority than cantonal laws. Similarly, the German Constitution while detailing the rights of individuals and states and prescribing the various functions of various authorities bestows only partial constitutional jurisdiction on the courts (Art. §19) and provides no complete assurance for the nullification of a statute which, though duly enacted by the Legislature, might violate any of the guaranteed rights and trench on the sphere assigned by the constitution to a state or any organ of government. The Polish Constitution (§38) declares that 'no statute may be in opposition to this constitution or violate its provisions.' But a subsequent article in the fourth section (§81) categorically denies to the courts the right to enquire into the validity of duly promulgated statutes. The Belgian Constitution (Art. 28) declares that the authoritative interpretation of the laws shall belong only to the Legislative power. The majority of the

Switzerland, etc.

states, old or new, on the continent of Europe are in the same predicament. It is true that this does not destroy the utility of the constitution: public opinion generally sees to its enforcement; to tamper with it may wreck the careers of politicians and ministries. But the fact remains that in the last resort the Legislature, that is to say, the majority in the Legislature is the master of the constitution, the judge of its meaning and application.

The Indian Situation.

Such an arrangement cannot meet the needs of the Indian situation. In the first place, it is the majority in the Legislature and the Executive supported by it in the Federation or the Provinces, from which the rights of minorities have to be protected. To make the legislature the judge of its own powers would be largely to nullify the guarantee of rights to various groups. In practice, the Legislature will be led by the Cabinet which, when dominated by one section, will hold the others at its mercy. A general election which may call the Legislature and its leaders to account may be two or three years ahead and in the meanwhile the mischief may work up serious discontent. In the second place, the unquestioned supremacy of the Federal Legislature and therefore of its nominee Executive may at any time mean serious encroachment on Provincial autonomy. Not only the cause of self-government, perhaps also of good government, may suffer from this reversion to centralisation but it may lead to deep political misunderstanding. A province with a Muslim majority, for instance, may feel that in spite of all autonomy and guarantees, it was still at the mercy of the majority dominating the Federal Legislature. It is therefore essential to vest in the courts the

power to declare any statute or action, federal, provincial or local, null and void in the course of any trial, on the ground that it is in excess of the authority possessed by those responsible for it, that is to say, on the ground that it violates the constitution.

Judicial Supremacy.

This function of the Judiciary really flows from the Anglo-Saxon common law which regards officials amenable to the Judicial process like private persons, which would refuse to recognise as valid any action which violates the law and which would apply the higher law in case of any conflict between it and bylaws. The latter, in fact, would *ipso facto* be *ultra vires*. In France and elsewhere the doctrine of separation of powers and the resulting *droit administratif* withdraw from ordinary courts all questions touching the rights and duties of public officials as such. As a result, the Legislature and the Executive become independent of the courts. It is desirable to incorporate the common law principle specifically in the constitution. It will unmistakably make the courts guardians of the constitution with its fundamental rights and set the apprehension of provinces, minorities and individuals at rest. After the example of the United States, the doctrine of Judicial Supremacy is acknowledged in Mexico, Argentina, Bolivia, Columbia, Venezuela and Cuba. The Norwegian Courts assumed authority over constitutional interpretation in 1904 and the Roumanian in 1912. The Irish Constitution (Art. §65) expressly grants jurisdiction over constitution to the High Court.

In Czecho-Slovakia, which has a minority problem, the very first Article of the constitution declares that 'enactments which are in conflict with the constitutional charter or with laws which may supplement or amend

it are invalid.' The second article establishes a constitutional court for the purpose. If there are to be any guarantees or demarcation of powers at all, a Supreme Court is necessary to stand guard over them. "There is among political bodies and offices of necessity a constant strife, a struggle for existence, similar to that which Darwin has shown to exist among plants and animals; and as in the case of plants and animals so also in the political sphere this struggle stimulates each body or office to exert its utmost force for its own preservation and to develop its aptitudes in any direction wherein development is possible."[1] In the midst of this struggle the judiciary alone can maintain the equilibrium.

The United States.

This use of the Judicature was first made on a comprehensive scale in the United States, adhering as they did to the common law which differs in so many respects from the implications of Roman law. 'Judicial supremacy is the keystone of the American political system.' Under this procedure, no statute or executive action comes *ipso facto* before the courts. Nor do the latter go out of their way to sit in a judgment on any statute that may be enacted, any action that may be taken. Such a procedure would mean endless confusion of Judicial with Legislative or Executive powers and would take the judges into duties for which they could hardly be expected to possess adequate qualifications. What happens is that in the course of any suit, the judges consider whether the Federal statute in question is in conformity with the constitution, whether a Federal action conforms both to the constitution and to Federal Statutes,

[1] Bryce, American Commonwealth, I, 401.

whether a State statute conforms to the State constitution and laws and to the supreme Fundamental Law. The judges hear the counsel on either side, weigh the pros and cons as they would do in any judicial investigation and then refuse to recognise the validity of whatever violates the Fundamental law or any other binding law. They treat the Legislatures as secondary law-making authorities, the Executives as doubly bound by the constitutional and ordinary statutes to act within legal limits and declare null and void whatever is in excess of constitutional powers. It is thus obligatory on all to obey the constitution in every particular. Since a test case can always be brought, it requires a conspiracy of the whole nation to shield an unconstitutional exercise of power from the courts. A single individual, if dissatisfied, can always manage to bring the matter before the courts. In practice, then, it would work out that the following could at any time be declared *ultra vires* in India:—

Application to India.

A Federal statute violating the Federal constitution.

A Federal executive action violating the Federal constitution and Federal statutes.

A provision of a Provincial constitution violating the Federal constitution or Federal statutes.

A provincial statute violating the Federal constitution, the Provincial constitution or Federal statutes, if any, on the point.

A Provincial executive action violating the Federal constitution, the Provincial constitution,

Federal statutes, if any on the point, or Provincial statutes.

A local by-law violating any of the above.

A local executive action violating any of the above or the by-laws of the local board.

All authorities would thus be forced to adhere to the law; the spirit of law will pervade government in all its branches.

Another great advantage of the system shall be that the implications of constitutional provisions would be worked out, not in the heated atmosphere of the legislature, nor in the narrow grooves of the Executive but in the calm detachment of the judiciary with the assistance of the best available legal talent. It was in this manner that the constitution of the United States was applied to the exigencies of affairs. Chief Justice Marshall, who presided over the Supreme Court from 1801 to 1835 has been reckoned a second maker of the Constitution.

The Supreme Court in the United States.

As Bryce says, "Marshall did not forget the duty of a judge to decide nothing more than the suit before him requires, but he was wont to set forth the grounds of his decision in such a way as to show how they would fall to be applied in cases that had not yet arisen. He grasped with extraordinary force and clearness the cardinal idea that the creation of a national government implies the grant of all such subsidiary powers as are requisite to effectuation of its main powers and purposes, but he developed and applied this idea with so much prudence and sobriety, never treading on purely political ground, never indulging in the temp-

tation to theorize, but content to follow out as a lawyer the consequences of legal principles, that the constitution seemed not so much to rise under his hands to its full stature, as to be gradually unveiled by him till it stood revealed in the harmonious perfection of the form which its framers had designed. That admirable flexibility and capacity for growth which characterize it beyond all other rigid or supreme constitutions, is largely due to him, yet not more to his courage than to his caution."[1]

In Federations where the common law obtains the courts have freely exercised similar powers. The reports of the cases on the constitutionality of Canadian legislative enactments fill two thick volumes. A study of judicial pronouncements is now indispensable to a comprehension of the constitution of the Australian Commonwealth.

Criticism.

It has been suggested by some that the supreme court in the United States is proving unequal to the task of interpreting the constitution or that it never was quite adequate. It has been argued that its judgment in the case of Dred Scott *v.* Sandford in 1857, upholding an outrageous contention of the slave-holders did much to precipitate the War of Secession in the sixties which until 1914 ranked as the greatest war in history.

Reply.

In reply to these criticisms it may be admitted at once that judges are only human and liable to err. But it must be pointed that whatever the judgment in the Dred Scott case the civil war was sure to come and that the drawbacks of the court chiefly arise from the brevity of the

1 Bryce, *American Commonwealth*, *I*, p. 386.

constitution and from the difficulty of constitutional amendment in the United States. A constitution which is not detailed enough, which almost refuses to change and which has admitted only a score of amendments in the course of one hundred and forty years of profound social and economic transformation, of vast territorial expansion and intellectual revolution, imposes on the courts the heavy responsibility of adapting it by mere interpretation, to the conditions almost of a new world. If the central difficulty of the situation is borne in mind, the court must be adjudged to have discharged its functions marvellously well. It is indeed regrettable that the Supreme Court should have occasionally given varying decisions, as for instance, on the meaning of the First and Fourteenth amendments, and that its handling of certain economic problems such as the Legal Tender should have left much to be desired. But, properly speaking, all these matters should have formed the subject of Legislative enactments or constitutional amendments. In any case, the court has done infinitely better than the Legislature or the Executive could possibly have done. Judges may sometimes bend before currents of popular feeling but as a rule they are loyal to their legal conscience and to the general sense of the legal profession, even when they recognize the principle of development.[1] In India we could profit by American experience and make the constitution proper more detailed and more easily alterable while reserving the guarantees to minorities for alteration only with the consent of the minorities themselves. The courts should

[1] C. A. Beard, *The Supreme Court and the Constitution*; C. G. Haines, *The American Doctrine of Judicial Supremacy*; Bryce, *American Commonwealth, I*; *Wilson, Constitutional Government in the United States*; Burgess, *Political Science and Constitutional Law*.

then prove perfectly adequate to the task of constitutional interpretation.

Judiciary in the United States.

After the War of Independence the Federal Government in the United States found each state running its own system of Judicature. So strong was state feeling that the States would not have acknowledged any Federal Court as a general appellate court. On the other hand, the task of interpreting a constitution and federal statutes binding on all alike could not have been entrusted to these state courts, each supreme within its own jurisdiction, and each liable to the pressure of state proclivities. So, the Union set up a Supreme Court at Washington and Federal Circuit Courts of Appeal, Circuit Courts and District Courts in various states, charged to take cognisance of matters in which the Federal Constitution, Federal subjects or statutes were involved. Hence the United States has had a double judicature existing side by side, each directly touching the citizen, and each trying to appropriate the borderland of jurisdiction. The system is not only very costly, but it sometimes places the citizen in a grave predicament. In Australia where state-feeling, while strong, was not as dominant as in the United States, they invested the ordinary courts with all jurisdiction, constitutional or otherwise and only set up at the top a Federal High Court, empowered to entertain appeals from the highest state courts. The same practice prevails in Canada. In India where no provincial autonomy exists to hamper the inauguration of a uniform judicial system, it can easily be arranged that the courts, as at present, should entertain all kinds of

Australia.

Canada.

suits, but that on constitutional points, as on some other points of law, an appeal should lie from the highest provincial court to a Supreme Court at Delhi. This Supreme Court shall be, for all purposes, the highest court in the land, though on specified points it may allow, as in Australia or Canada, an appeal to the Judicial Committee of the Privy Council. The Commonwealth of Australia Act provides that no appeal shall lie to the Crown-in-Council upon constitutional questions unless the High Court itself shall, being satisfied that the question is one which ought to be determined by the Privy Council, certify to that effect. In other cases the appeal will lie from the Supreme Courts of the states (with the alternative of an appeal to the High Court) and from the High Court itself, when special leave is given by the Privy Council. The Commonwealth Parliament may limit the matters in which such leave may be asked but the laws imposing such limitations are to be reserved for the pleasure of the Crown. An arrangement on these lines can be incorporated in the Indian Constitution. A single system of judicature would be much more economical and would avoid the confusion inherent in a double judicature.

India.

The Privy Council.

A Single System of Judicature.

The Supreme Court at Delhi should have original jurisdiction in disputes between the Federation and an Indian State, between two provinces or two Indian States, or disputes affecting ambassadors, plenipotentiaries or consuls, or disputes involving very important points of constitutional law. For the rest, its jurisdic-

Original Jurisdiction of the Supreme Court.

tion should be appellate. Under this scheme, disputes involving constitutional points will, like others, ordinarily come before the ordinary courts in the provinces but an appeal shall always be admissible to the Supreme Court which may also review the proceedings in other such cases not forming the subject of appeal. Thus the Supreme Court shall always be the final authority on points of constitutional interpretation.

Validity of Laws.

The power to pronounce on the validity of Indian legislative enactments will not be new to the Indian courts. In Empress *v.* Burah referred to by Dicey, the Calcutta High Court held a certain legislative enactment of the Governor-General-in-Council to be in excess of the authority granted by the Imperial Parliament and therefore invalid and on this ground entertained an appeal from two persons. On appeal, the Judicial Committee of the Privy Council gave a different interpretation. But the power of the courts to pronounce on the validity of Indian legislative enactments was not questioned.[1]

In Pandurang *v.* Secretary of State for India in Council it was held that a local legislature could not affect, in any way, the jurisdiction of a High Court of Judicature and that it could neither add to it nor subtract from it. Accordingly, the Improvement Trust Act passed by the Bombay Legislative Council had to be enacted afresh by the Governor-General-in-Council.[2] The Law Reports contain several other similar decisions.

1 Dicey, *Law of the Constitution*, 8th edition, pp. 97-98; I.L.R., 3 Calcutta, 1878, pp. 63, 86—9.

2 I. L. R., 27 Bombay, 1903.

But under the present scheme this power will become so important and will be exercised probably on so many more occasions that it necessitates some alterations in the existing Indian judicial system. The Supreme Court at Delhi should be presided over by a Lord Chief Justice and consist of eight or nine other Judges, as determined by Parliament within the terms of the Constitution, appointed by the King from among High Court advocates of not less than twelve years' standing or, in the first instance, from among the judges of the existing High Courts. The status and emoluments of the Judges should be high enough to attract the best legal talent of the country. To ensure independence, the remuneration of the Judges shall not be subject to reduction during their tenure of office and they shall not be removable except on an address presented to the King's representative by the Assembly and the Senate in the same session on the ground of proved misbehaviour or incapacity.

Judicial Organization.

One other safeguard should be incorporated in the Constitution. The maximum number of judges should be definitely fixed. The Constitution of the United States omitted to specify the maximum, with the result that Congress has twice threatened to create additional judgeships to alter the alleged political complexion of the Supreme Court. Better counsels have so far prevailed and a party race to swamp the Court has been averted. But a danger has been revealed and should be provided against in the Indian Constitution.

The first bench of the Supreme Court may be recruited predominantly from the benches of the Provincial High Courts, but this method will not be free from danger in case of subsequent vacancies. The prospect of

elevation to the Supreme Court, at the hands of the Executive, may affect the independence of the Provincial High Courts or, at any rate, render them liable to suspicions and misunderstandings. It should be understood that subsequent vacancies at the Supreme Court shall for the most part be filled by direct recruitment from the bar. No rule can be laid down but it may be hoped that the Supreme Court will always have judges from various provinces and communities. The United States requires six Judges for a Supreme Court decision and further lays down that every case should be discussed by the whole body twice over. In ordinary cases this stringent procedure appears needless. But the Indian Constitution may provide that every case involving points of Constitutional interpretation should be decided by at least six Judges and the decision be confirmed by the whole body. The Chief Justices and Puisne Judges of the Provincial High Courts should be appointed by the King from among High Court advocates of not less than ten years standing or from among the senior ranks of the Judicial Service. As in the case of the Supreme Court, their remuneration shall not be reduced during their tenure of office nor shall they be removable except on an address presented to the Governor-General by the Assembly and the Senate in the same session on the ground of misbehaviour or incapacity.

Separation of Executive and Judicial Functions.

The duties which are to fall to the Courts under the proposed scheme will not be discharged to the public satisfaction until executive and judicial functions are separated. It is needless here to enter into other arguments based on general considerations of justice for the change or into arguments based on

reasons of economy and strong government for the present position but the new functions which are to devolve on the Courts on an unprecedented scale are decisive in favour of a complete demarcation of executive and judicial services. The public is not likely to repose complete confidence in Courts presided over by executive officers who are called upon to try cases pertaining to the legality of executive acts. It is true that their decisions can be appealed against, but it is not only desirable in principle but expedient in practice, to have lower courts which shall not be suspected of bias in favour of the executive. Every province should have its own judicial service, as in France, England, Germany and other countries, divided into Revenue, Civil and Criminal branches and various grades as at present, all recruited partly by competitive examinations, partly from the bar and partly by promotion from lower ranks.

Writ of Habeas Corpus.

It shall be possible for any one to move the Courts for a writ of Habeas Corpus and the arrested person must forthwith be brought to trial. The position of Indian Courts in relation to Habeas Corpus is at present rather vague and uncertain and should therefore be clearly stated in the Constitution. In many countries constitutions guarantee trial by jury but the arrangement presupposes the general establishment and recognition of the jury system. The system itself is by no means an unmixed blessing. It may be allowed to develop on lines suitable to India but no constitutional provision is necessary.

Trial by Jury.

The state should be liable to be sued for torts like private persons. According to the principles of the Common Law, an official acting unjustly, that is, in

violation of some law, is sued as an individual and is liable to pay damages from his own purse. In England as well as in the United States it is the official who pays damages. In England the Crown cannot be sued except with the permission of the Attorney-General. In other words, the state can be sued only with its own consent. The result is occasionally grave injury to citizens. The Australian Constitution prescribes that a state can be sued, jurisdiction resting with the Federal High Court.

Martial Law.

It is desirable, so far as possible, to specify the conditions under which martial law can be declared and administered. Martial Law should be carefully distinguished from Military Law, which applies only to persons in the military, naval and air forces. Recent events in India, in South Africa and elsewhere demonstrate that a regime of martial law, which at present amounts to a negation of law, leaves lasting bitterness behind. It is impossible to provide against all eventualities but a few general principles may be incorporated in the Fundamental Law of the land. In the first place, martial law should never be declared as long as it is physically possible for the ordinary Courts to function. When foreign invasion, violence or lawlessness make it impossible for the courts to meet, summon the parties and witnesses and pronounce sentences, a declaration of martial law may be made, but not earlier. Likewise, as soon as it becomes possible for the courts to resume their sittings, martial law should be withdrawn. In the second place, ordinary judicial officers should always be associated with martial law officers. In the third place, offences committed before the declaration should not be tried under martial law. In the fourth place, no sentence of

death passed by a martial law tribunal should be executed until it has been reviewed and upheld by the ordinary competent courts after the restoration of normal conditions. In the meantime the condemned person may only be kept in gaol. In the fifth place, all sentences of deportation, imprisonment, fines or confiscation of property, should on the return of normal times, be automatically reviewed by the ordinary courts and might be upheld, modified or reversed. In the sixth place, torture, fancy punishments, etc., should be prohibited in the code of martial law. It is understood that the declaration of Martial Law does not *ipso facto* suspend the writ of Habeas Corpus, which can be done only by an express decree. Under the rigid rule of law in England, martial law is reduced within the narrowest limits and is subjected to the supervision of the Courts.[1] In India, the Constitution must be called to aid the purpose.

[1] Dicey, *Law of the Constitution*, 8th edition, p.

CHAPTER IX

THE PUBLIC SERVICES

Democracy and the Public Services.

It is a mistake to suppose that the permanent services play a less important rôle under a democracy than under any other form of Government. The political sovereign can only lay down the policy and determine the principles, and must always depend on the services to carry them into execution. The capacity and integrity of the latter will mainly determine the character of the day to day administration, its efficiency, and the confidence it will command. Democracy imposes on the services the additional momentous duty of keeping its own vagaries in check by supplying expert knowledge and experience to Parliamentary Chiefs, to Parliamentary Committees, to local boards, and to those advisory and consultative bodies which ought to be the invariable concomitants of popular government. Legislators change every few years; besides, sheer numbers render it impossible for them to engage in administrative details. Ministers are not much better situated. The attendance at legislatures and cabinets is exhausting; and then there are so many engagements of various descriptions. Nor is their life long enough. Some time ago Bodley pointed out that in twenty-one years France had twenty ministers and seventeen different politicians held the portfolio of foreign affairs.

In a changing world of temporary legislators and ministers, the Permanent Services alone can supply the

solid, stable administrative framework which is essential to associated life on its political side. What Burke said of ministers in the 18th century applies in the 20th with much greater force to permanent Civil Servants. "The laws reach but a very little way," he remarked, "Constitute your government how you please, infinitely the greater part of it must depend upon the exercise of powers which are left at large to the prudence and uprightness of ministers of state. Even all the use and potency of the laws depends upon them. Without them your Commonwealth is no better than a scheme upon paper; and not a living, active, effective organisation." The progress of knowledge, and invention, and the growth of statism, have now immensely enhanced the importance of the expert. The permanent official must be the balance-wheel, if not the mainspring, of the administration. It is therefore as necessary to consider the status, qualifications, recruitment and organisation of the services as to determine the composition of the legislature or the ministry.

Verdict of Administrative History.

The history of administration in India, Japan, Europe and America has established three conclusions which may be affirmed as universally true. In the first place, nomination by the executive results in favouritism, in acute disappointment and discontent to many and in the loosening of the administrative fabric. Incapable men of the class to which the members of the executive may belong are preferred to infinitely better qualified outsiders. The service tends to become a close preserve and to function in the class-interest. The nominating authorities find themselves encircled by a troop of importunate beggars who make their lives miserable. It may be

Nomination.

admitted that nomination sometimes gives honest, diligent and capable servants to the state but the gain is more than counter-balanced by the evils almost inseparable from the system. Nomination was chiefly responsible for the failure of the experiment of admitting Indians into the Indian Civil Service from 1879 to 1889.[1]

In the second place, popular election to administrative or judicial posts stands condemned in the light of American experience. It may answer fairly well in a small area where everybody knows every one else. But it rarely yields satisfactory results in bigger localities where parties must necessarily intervene and select candidates. Eloquence, charm of manner and arts of managing men are no index to administrative capacity. Besides, party wire-pullers make a game and a business of politics and almost openly sell the loaves and fishes of office.

Election.

In the third place, permanence of tenure is a condition precedent to administrative efficiency. Apart from the value of experience and peace of mind in public servants, a contrary system means dismissals and replacements on merely political grounds. The theory of rotation of office applied under a false view of democracy in some American States for the first time, soon became a synonym for graft. Every change in administration was the signal for a fresh hecatomb of public officials. A hundred years ago Pre-

Permanence of Tenure

The United States.

[1] Lady Betty Balfour, *Lord Lytton's Indian Administration*, pp. 526—31.

sident Jackson introduced the "Spoils system" in the Federal administration on the principle that to political victors must belong administrative posts which, therefore, must be vacated by their previous holders, howsoever honest, experienced or diligent they might be.

The party system was deflected from its true purpose. J. Schouler, the historian of the United States, writes that "a national party became an army of occupation under a Commander-in-Chief, intrenched in the offices, and with all the resources of national influence at command, to resist, if need be, majorities and public opinion." As another writer put it "The moral and material corruption which the party leaves behind it in its pursuit of power penetrates into the furthest recesses of public life."

The evil was intensified all over the country, specially in the Municipalities until the whole system began to stink with corruption. The country was plundered by the professional politicians of the Machine who freely levied blackmail on their nominees and stooped to embezzle public funds. Sixty years later public opinion awoke to the gravity of the situation and launched a Civil Service Reform, which on the principle of permanent tenure, has since made steady progress though it has not yet reached completion.

The system of appointment by nomination or on political grounds is doubly objectionable in a democracy. It makes too heavy a demand on the virtue of thousands of politicians in all ranks of society. Legislators who have been blessed with young nephews or sons-in-law sometimes bargain their votes with ministers for appointments. Ministers, always in need of parlia-

Politicians and Patronage.

mentary support, are only too ready to buy off rebels with jobs for their nominees, as in England until the middle of the nineteenth century. But the Nemesis follows speedily. No minister can ever hope to satisfy the numberless demands pressed on him and creates enemies of those whom he must disappoint. On the other hand, no legislator can procure tangible rewards for all his supporters and must expose himself to gratuitous unpopularity. The whole political atmosphere is thus charged with bickerings, suspicions, bargains, bribes. The resulting discomfort to statesmen can be easily imagined. "Artemis Ward's description of Abraham Lincoln swept along from room to room in the White House by a rising tide of office-seekers is hardly an exaggeration. From the 4th of March when Mr. Garfield came into power, till he was shot in the July following, he was engaged almost incessantly in questions of patronage."[1] It was, in fact, the assassination of President Garfield at the hands of a disappointed office-hunter that roused the Americans to the need of taking the Civil Service out of politics.[2] In spite of recent reforms, "the courtesy of the Senate" (not to speak of the states) which consists in Senators practically dictating appointments in their constituencies is still too costly in morals and efficiency.

In France deputies are constantly begging ministers for posts, licenses and other favours for relations or constituents, are bargaining their votes and worrying the government beyond measure. A detached observer, writing in *The Political Science Review*

1 Bryce, *American Commonwealth*, I, p. 64.

2 L. Mayers, *The Federal Service*.

in 1913 thus described the situation: "The rôle of the French deputy is to-day largely that or a sort of *chargé d'affaires* sent to Paris to see that his constituency obtains its share of the favours which the government has for distribution. Instead therefore of occupying himself with questions of legislation of interest to the country as a whole he is engaged in playing the rôle of mendicant for his party district. . . . . the ministers, being dependent on the support of the deputies, naturally desire to keep on good terms with them. . . . Under such circumstances the deputy has become the political master of the circumspection ; he dictates appointments and promotions, the conferring of decorations and the distribution of favours generally."[1] In Jugo-Slavia to-day the Peasant-Democratic coalition is bitterly complaining that the Government have converted the civil service into a means of rewarding its own supporters and that, partly on this account, the whole administration is shockingly corrupt. In pre-Fascist Italy, the deputy relied for his seat chiefly on his talents for intrigue to procure jobs and grants. The situation is even worse in boards of local self-government. Here the standards of members are necessarily lower than those of Parliaments; the number of petty jobs is larger, the pressure of constituents more insistent. The sad plight of municipal self-government in the United States, in Japan, and, it is to be feared, in some cities in many European countries and Indian provinces, illustrates the danger of placing patronage in the gift of elective

France.

Italy.

Local Boards.

[1] J. W. Garner, *Political Science Review*, VII, 1913, p. 617.

boards. The Consultative Committees which it is proposed to set up from top to bottom in the Indian administration may become a nuisance if their members can influence appointments.

In Great Britain the Civil Service was long "the outdoor relief department of the British Aristocracy." The Duke of Wellington complained in 1829 that members of Parliament claimed the right to dispose of the patronage in their constituencies. The evidence submitted before the Commission on Civil Service shows that the system of nomination was responsible for subtle corruption all round in England up to the third quarter of the nineteenth century. "Let any one," so we read in the course of a long document, "who has had experience, reflect on the operation of patronage on Electors, Parliament and the Government. Over each it exercises an evil influence. In the election it interferes with the honest exercise of the franchise; in Parliament it encourages subservience to the administration; it impedes the free action of a Government desirous of pursuing an honest and economical course, and it occasions the employment of persons without regard to their peculiar fitness. It is a more pernicious system than the mere giving of money to electors or members of Parliament to secure their votes. It is bribery in its worst form." Sir James Stephen, Major Graham, Mr. Chadwick and other high officials confessed that their departments were full of idle, incapable, aye, illiterate nominees! Reporting in the same strain, the Select Committee declared in 1853 that the Civil Service had become the dumping ground of the unambitious, the indolent and the worthless. Some time afterwards, Mr. Lowe, once Chancellor of the Exchequer

England.

remarked that "under the former system there never was such a thing known as a man being appointed because he was supposed to be fit for the place." Such quotations can be multiplied indefinitely not only from parliamentary speeches and papers but also from contemporary literature.

Japan.

Japan has a similar tale to tell. There the introduction of the Civil Service examination in the eighties of the last century removed a great source of discontent and enhanced the efficiency of the services.

In the light of all experience, nomination stands condemned. If democracy is to be made safe for administration, it is absolutely necessary to sever patronage from politicians to the largest possible extent. The remedy lies in the extension of the system of open competitive examinations which was inaugurated by a committee presided over by Macaulay for recruitment to the Civil Service in India, which was established in England after 1871 and which after Mr. Dorman B. Eaton's report was partially adopted in the United States by the Pendleton Act in 1883. For the Federal Service in India, there ought to be separate open examinations for executive posts, engineering, diplomatic and other corps, superior clerical posts, inferior clerical posts. At the top there will be left a few posts like those of Secretaries and Under-Secretaries which must be filled by nomination from the Executive Services or from the outside, and these posts, too, shall be permanent, irrespective of the party-complexion of ministers. At the bottom will remain jobs requiring manual labour for which no scramble need be feared.

Open Competitive Examinations.

Federal Services.

All other positions should be thrown open to competition. Similarly, every province should hold competitive examinations for executive, police, public works, medical, judicial and other services. Finally, every province must have examinations for various municipal and rural board services, requiring distinct qualifications. Every board must, after wide advertisement, select its executive officers, engineers, superior and inferior clerks from the respective categories of candidates who have satisfied the competitive tests. For all higher examinations, the subjects should be general and not technical; the effort should be to test intellectual strength, rather than the amount of specialised knowledge. Promising young men would not spend years at studies which, in case of failure, would be of no use to them. The Dutch who tried a different plan for their colonial services were forced to abandon it some years ago. Every province should have its training colleges for secondary school teachers and every district its normal schools for primary school teachers. Every school, financed by the Provincial Government, or local boards, must draw its teachers from the respective ranks of trained candidates who have satisfied the final examinations.

Provincial Services.

Local Boards Services.

Subjects for Examinations.

Training Colleges.

Under this scheme, all grades, except the very highest and the very lowest, of federal, provincial and local services will be filled by persons of capacity; patronage will cease to be a source of worry and corruption; minorities will escape any injustice and be free, by dint of their qualifications, to win any number of

posts. The Merit System holds out two other great advantages. In the first place, it destroys the motive to create new posts for favourites and thus makes administration economical. In the United States, nomination led to the multiplication of functionaries but the partial introduction of competition immediately diminished the tendency. In the second place, open competition will have the incidental advantage of giving an enormous impetus to the higher education of the country. The prospects of permanent tenure, fair salaries and the prestige which always attaches to office would call forth the best that there is in young University students and High School boys. With pardonable pride in his work, Sir Charles Trevelyan stated, in the course of a letter that "the opening of the civil and military services, in its influence upon national education, is equivalent to a hundred thousand scholarships and exhibitions of the most valuable kind—because unlike such rewards in general, they are for life—offered for the encouragement of youthful learning and good conduct in every class of the community." One already perceives the wholesome effect which the institution of a number of examinations in India has produced on Colleges and Universities.

The Merit System Economical.

Impetus to Education.

To enforce the scheme, it will be necessary to have a series of Public Services Commissions appointed by the respective administrations. The Federal Public Services Commission should be appointed by the Prime Minister. The tenure and regulations of the Commission should be permanent in character. In France the decrees and orders regulating the Civil

Public Services Commissions.

Service can be set aside by other decrees and orders. The result has been a good deal of favouritism as exemplified in the appointment of Cabinet *attachés* and others to high administrative posts. Permanence of tenure alone will make the Commissioners independent of the Executive. The Commission should prescribe the qualifications for various examinations in consultation with the heads of the services concerned and conduct the tests. For similar purposes, every province should have three Commissions, one for the various provincial services, one for the various municipal services, and one for the various rural board services. It need hardly be added that the grades of schooling and age, the tests for the three categories of services and for the various executive, technical and clerical, superior and inferior branches in each category shall be distinct. All tests shall be open to all young people of a certain age who possess the requisite preliminary qualifications, without distinction of creed, caste, colour or race. It may be pointed that a separation between the higher and lower branches of the same service is essential. Owing to its absence, the Washington Civil Service has had little attraction for University graduates. Written examinations should always be supplemented by oral tests conducted by experts, while a preliminary medical test should weed out the physically incapable. Mechanical intelligence tests, such as those used in the American Army in 1917-18 and in business firms have been advocated in the United States but the science of intelligence-testing is still in its infancy. Under the merit system, the services will not only become purer and more efficient but also be democratised. All posts, including those above and below which do not admit of competitive tests, shall be held during good behaviour,

and in no case shall any dismissal, promotion or degradation take place for political reasons. Of course, nothing shall jeopardise the tenure of the present members of any services or violate the conditions and prospects promised when they signed the Covenant. But for vacancies as they arise in the natural course, the system of examinations should be resorted to.

Training.

Selection should in every case be followed by a period of training in the general methods of the service concerned and in the special work of the Department. All who occupy responsible positions should be expected to keep abreast of movements in thought and practice which may concern their departments. For instance, Civil Servants in the Department of Public Instruction should be aware of the latest experiments in education in Europe, America and elsewhere. Civil Servants in the ministry of Local Self-Government must make a thorough study of local self-government in the civilised world and keep in touch with the latest reports and books on the subject. Those employed in the ministry of labour should not merely have a grounding in economics but also a thorough acquaintance with labour legislation in various countries. With the accumulation of recorded knowledge in the world, the Civil Service must become a learned profession. Nothing else will prevent it from falling into a routine of dead monotony. Besides, it will be nothing short of a national calamity, if the brilliant University men who enter the services are lost in red tape and their brains allowed to rust. A few departures from the existing practice may partly serve to secure this end. In the first place, Civil Servants should be encouraged to travel abroad once in ten or fifteen years

to study the working of corresponding departments in other countries. In the second place, as many of the government reports as possible should be signed by their authors who would then be encouraged to put forth their best intellectual efforts to make a reputation. Blue books, too, would thus become readable. In the third place, the Civil Servants should be permitted, without disclosing any secrets, to utilise their administrative experience in their independent writings and to suggest administrative reforms. These incentives to systematic intellectual endeavour will maintain the creativeness of the services—a quality which is of capital importance in this age of growing state activity. Administration is a science as well as an art and must be cultivated on both sides. If the reforms suggested by world-experience are carried out and, further, if the Advisory Committees bring the officials in continuous touch with public men, the Civil Servants will appear to the public as men, not as mere machines or files in red tape.[1]

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1 For some valuable ideas on the Civil Service, see *The Development of the Civil Service*, a series of lectures delivered before the Society of Civil Servants, 1920-21, with Preface by Viscount Haldane. Also, *The Report of the Machinery of Government Committee*. The Journal of the Institute of Public Administration is invaluable.

CHAPTER X

THE AMENDMENT OF THE CONSTITUTION

Need of Amendment.

Whatever the care and foresight expended on the framing of a constitution, nothing can obviate the need of its amendment in future. New problems may arise which our highest flights of imagination cannot anticipate. Time may alter existing conditions beyond recognition and demand a somewhat different fundamental law. Attempts have indeed been made to place fundamental matters beyond amendments. For instance, the constitution of Norway as framed in 1814 and that of Greece, promulgated in 1864, sought to restrict amendment to matters not fundamental. They omitted, however, to specify what were fundamental matters. The constitution of France similarly forbids any proposal to amend the Republican form of government. But it has been argued that the National Assembly might alter the prohibition itself. The fact is that absolute prohibition of amendment means too heavy a demand on the conservatism of posterity.

The Statuto or the Constitution granted by King Charles Albert in 1848 omitted to provide for alteration. A series of plebiscites was taken when it was extended to the rest of Italy (1859—71) but for the rest the legislature has altered it in an ordinary manner. The French Charter of 1830 contained no provision for alteration which led De Tocqueville, the greatest of contemporary

political writers, to think that it was unalterable. The actual result, however, was that it was altered like an ordinary statute. The paradox is true that to make the constitution unalterable is to render it easily alterable. There are some constitutions which prescribe or limit periods for their revision. In the United States, the State of Vermont has laid down that the Senate alone can propose amendments and that only at intervals of ten years; New Hampshire declares that every seven years the question whether or not the constitution shall be revised by a convention called for the purpose shall be submitted to the people; in Iowa the same question is put every ten years; in Michigan every sixteen years; in New York, Ohio, Oklahoma and Maryland every twenty years. The decennial inquiry prescribed by the Government of India Act of 1919 is too well-known to need exposition. The new constitution of Poland (Article § 125) after detailing rules on constitutional amendment prescribes that "Every twenty-five years after the adoption of the present constitution, revision shall take place following the decision of the Sejm (the lower house) and the Senate, united in a National Assembly, and voting by an ordinary majority." The Irish Constitution (Art. § 50) also contains one time-limit. After eight years amendments may be proposed, and if passed by both houses, should by a referendum be submitted to the people whose majority shall prevail. But such time-limits are rather ill-advised. They may either lead to needless revision or retard it when needed. In the near future, some clause or other of the constitution may be found unworkable or productive of strange consequences. No sooner was the Constitution of the United States put into operation than it was discovered that some contingencies had been left unprovided for or at

any rate could not be fairly covered by any section of the instrument. No less than ten amendments had to be passed within two years of the enforcement of the Constitution.

It is desirable to prescribe some method of constitutional amendment, without laying down a time-limit. It should not be so easy as to assimilate the constitution to the character of an ordinary statute. That will destroy the very purpose of a constitution. "The plant will not grow if men frequently uncover the roots to see how they are stinking."[1] Nor, as the experience of the United States has shown, should the method be so difficult as to make the constitution almost unalterable. An organism which can scarcely bend at all may break at the impact of over-mastering forces. The problem, as stated in an earlier chapter, is to reconcile Durability and Adaptability.[2] The golden mean must be followed but in the case of India a distinction must be made between the clauses guaranteeing the rights of minorities and the rest. The former should be capable of amendment only after the usual conditions have been satisfied and, in addition, after the representatives of the minority in question have assented to the proposed change by a two-thirds majority. As was pointed out earlier, there is nothing alarming about such a reservation. It answers to the reservation in the American Constitution that the senatorial representation of a state cannot be reduced even after the extraordinarily difficult process of amendment in general has been gone through. In addition, the consent of the state

Feasibility of Amendment.

Guarantee-clauses.

[1] Bryce, *Studies in History and Jurisprudence*, p. 221.
[2] *Ibid.*, p. 225.

concerned must be forthcoming. There is also another change which cannot be effected by the ordinary process of amendment alone. No state in the American Union can be divided, nor can any two states be combined without the consent of the legislatures of the states concerned. In the pre-war German Empire, the guaranteed privileges of the states could not be taken away without their consent. So, in the Indian Constitution the privileges of the minorities shall not be open to reduction or modification in the usual manner of amendment; in addition, the representatives of the minority concerned must agree to it, and that by a fairly large majority of themselves. Among the clauses guaranteeing the rights of minorities shall be reckoned those which lay down the fundamental rights, which prohibit all discriminatory legislation or executive action and which guarantee the quota of representation to them. It should further be laid down that if any amendment effected in the other clauses in the ordinary manner is discovered to be repugnant to the reserved clauses, it shall, to the extent of that repugnancy, be void and shall not be operative. The courts shall see that this intention of the constitution is carried out in letter and in spirit. The minorities will thus have perfect power to maintain all their guarantees and privileges unimpaired. No majority, howsoever large and howsoever completely in mastery of the legislature and the executive, shall be able to touch them.

The simple method of amendment by an act of the British Parliament does not appear to be possible in the case of the Indian Constitution. In the first place, no Parliamentary statute can legally be questioned in any court of law. So, an amendment which may violate the

Autonomy in Amendment.

reserved clauses of the constitution will not be liable to be set aside by the courts. In the second place, the British Parliament cannot be expected to be familiar with Indian requirements and, if it merely registers the opinion of some convention in India, may unjustifiably be held to account for any untoward consequences. As in the case of Australia,[1] Indian democracy should be authorised to amend the constitution, as distinct from the political settlement, without reference to Westminster. Such power of constitutional amendment is now one of the characteristics of Dominion status. It is enjoyed by Newfoundland, New Zealand and South Africa. The previous constitutions of the Cape and Natal allowed free change, though the constitutions of the Transvaal and the Orange River Colony provided for reservation as a precaution. Subject to the treaty, the Irish Free State Constitution can be altered within Ireland. If Canada does not formally enjoy the right, it is largely because Quebec, with her French population jealous of its privileges, is unwilling to see the people of the Dominion masters of the constitution. It is probable that further developments in the dynamic conception of Dominion status will be accompanied by yet larger powers of autonomous constitutional amendment.

Methods of Amendment.

In unitary states, as a rule, the methods of amendment are simpler than those in federations. France requires only a National Assembly—a joint meeting of the Chamber of Deputies and the Senate—to effect a change. The

[1] Sub-section XXXIX of section 51 empowers the Australian Parliament to make laws with respect to "matters incidental to the execution of any power vested by this constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth."

same procedure had been adopted in Haiti in 1843. Old Prussia required only an interval of twenty-one days to elapse between two readings for a constitutional amendment. For constitutional changes, Roumania fixed the quorum at two-thirds; old Bavaria at three-fourths. A two-thirds majority for amendments is also required in Bulgaria; a three-fourths in Greece and old Saxony. Quite a number of countries adopted the plan of combining a two-thirds majority with a dissolution followed by a reconsideration of the proposals of amendment. In Holland, Norway, Roumania, Portugal, Iceland, Sweden and some states in Latin America, this plan appears to have worked well. According to the Belgian Constitution (Art. § 131), the legislature has to declare the need of revision; it is then dissolved; in the new legislature, amendments have to be carried by a two-thirds majority in the presence of two-thirds of the total membership.

In Unitary States.

In the Federations where there are some state rights to be guaranteed, the process of amendment is often more difficult. Thus the United States Constitution lays down that "the Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this constitution, or on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as parts of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions, in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress" (Article 5). Mexico (§ 135) follows suit.

In Federations.

The United States.

Mexico.

Australia provides that a proposed amendment must pass each House of the Legislature by an absolute majority and then (after two but before six months) be submitted to the voters. If the proposal is approved by a majority of votes in a majority of states and at the same time by a majority in the Commonwealth as a whole, it is presented to the Crown for assent. In case of difference between the two Houses, if the one passes the proposal more than once, it must be submitted to the people for decision.

Australia.

In Switzerland and Columbia also amending proposals are referred to component states. The plan of calling special conventions for the purpose is provided for not only in the United States but also in Paraguay, Guatemala, Honduras, Nicaragua and Salvador.[1]

Switzerland.

In many countries the Referendum is now used for constitutional amendment. This is by far the best method as it secures the clear verdict of the people on the proposed alteration. But for reasons adduced earlier, the Referendum is not open to us at present. But something approaching it can be provided. It may be laid down that when a constitutional amendment has been agreed to by both houses, the lower House should be dissolved and a general election take place, inevitably on the issue of the constitutional proposal. If, after the election, the new House passes the proposal again by the requisite majority, and the senate agrees to it once again, it should become part of the constitution. It should be emphasised that in lieu of the Referendum the General

The Recommendation.

General Election the specific issue.

[1] *Select Constitutions of the World*; Bryce, *op. cit.*, pp. 211-12.

Election must intervene between the first adoption of the amendment and its final enactment, so as to give the people a chance of expressing their approval or disapproval of the proposed changes.

Majorities of two-thirds.

As for the other stages, the American plan of ratification by states has proved too cumbersome and is only too likely to break down in India. Apart from the discrepancies in the size of the provinces, it will not admit of application to the Indian States which may choose to enter the Federation in future and which may be very numerous and extremely various in area and population. As it is, the American plan may render the constitution almost unalterable, and impose too severe a strain on the law-courts. The double voting by a two-thirds majority in the Senate where the smaller units will have more than their proportionate representation should suffice to safeguard all the provincial and state interests. Special conventions are needless in view of the General election provided for. The new Lower House andt he Senate will amply fulfil the purpose. So,it is proposed that an amendment should satisfy the following conditions : firstly, the consent of both Houses should be forthcoming to the proposal ; secondly, this consent in either House should be the consent of at least a two-thirds majority in the presence of at least a two-thirds of the total number of members ; after the ensuing general election on the issue of the proposal, the amendment should again be passed by a two-thirds majority in the presence of a two-thirds quorum in either chamber. The three stages will give ample time for deliberation; the General Election, the agreement of the two Houses, the requirement of a two-thirds majority twice in both, will ensure that the amendment was really necessary. The double consent of the

Senate will mean a thorough consultation of the provincial interests enshrined therein. It must, however, be pointed out that to raise the proportion of the majority to a higher fraction, three-fourths or four-fifths, will defeat the whole purpose of the amending provisions, make the constitution well-nigh unalterable, and mean a dangerous approach towards the *liberum veto* which ruined Poland in the eighteenth century. In Australia even the preliminary two-thirds majority has been found difficult to secure. As for any amendment of the reserved clauses, the procedure outlined above shall be supplemented by the double consent of a two-thirds majority of the minority representatives. It will be necessary that the proposed amendment should, in the first instance as well as again after the General Election, be assented to by a two-thirds majority of the minority members in the Assembly and also by a two-thirds majority of the minority members in the Senate. Put together, the five stages of deliberation and the high majorities will mean the consent of practically the whole minority group before a change in the reserved clauses, or any change in the others touching the reservations in any way, can be effected.

CHAPTER XI

CONCLUSION

Every new constitution must contain a number of Transitional provisions to facilitate the new distribution of powers such, for instance, as appear at the end of the constitutions of Australia, South Africa, in the German Constitution (§ 166 ff.), Prussian Constitution (section XI, 81—88), the city of Danzig (§ 115), etc., etc. But in the absence of a political settlement it is premature and superfluous to work out the transitional details of the Indian Constitution. Consistently with the plan of this work, it need only be pointed out that the division of functions between the federation and the provinces and the adjustment of their respective finances should not be too precipitate but should be spread out over four or five years.

Transitional Provisions.

The constitution, as foreshadowed in the preceding chapters, will perhaps appear to many as rather complicated. When the requisite financial provisions are inserted and multitudes of necessary by-laws and regulations framed, it will become yet more intricate. If the principles enunciated here be adopted, Judicial decisions will supply another element of complexity. Add to these the series of constitutional relationships with Great Britain and the mass of Treaties, Engagements and Sanads with Indian States which the Federation must recognise, and it will be clear that Indian Governance will become a gigantic study in itself. In the

Constitutional Complexities.

modern conditions of life every constitution must be a complex one. Here simplicity would be artificiality itself. Burke, whose political insight equalled that of Aristotle, strongly denounced the application of geometrical methods to politics. In public affairs with their endless intricacies and ramifications, a straight line is not necessarily the shortest distance between any two points and no triangles are ever equal in all respects. The fundamental law of a complex society must be complex. It is remarkable that Western Constitutions in general have shown a tendency to lengthen in recent years. The constitutions of the states of the American Union now run into twenty-six, thirty-three, even forty-five thousand words. Some of the new constitutions in Europe are lengthy pamphlets.

Study of the Constitution.

In the Indian situation of diverse strands, a constitution and the statutes and regulations under it are bound to be voluminous. It will therefore be necessary to adopt special measures to make the chief provisions understood by the people. The German Constitution has an interesting Article (§ 148) that "when leaving school, each pupil has handed to him a copy of the constitution." We need insert no such clause but, as in the United States and in numerous other countries, the constitution should be studied in all High Schools and Colleges. Its principles of toleration, live and let live, equality of opportunity and other fundamental rights—all should be impressed on young minds. Thus, the constitution will be thoroughly understood by many people whose knowledge will filter below. Politicians, journalists, teachers, and public servants who come from the schools and colleges will already be familiar with its clauses, and, when necessary, will easily master the relevant statutes and rules. Such

widespread acquaintance with the Fundamental Law will be an incalculable help in the working of the instrument.

Parties.

In every democracy, the constitution is worked by parties whose organisation, often complicated, is in practice tantamount to part and parcel of the Governmental machinery. "Party association and organization are to the organs of Government almost what the motor nerves are to the muscles, sinews and bones of the human body. They transmit the motive power, they determine the directions in which the organs act. Their ingenuity, stimulated by incessant rivalry, has turned many provisions of the constitution to unforeseen uses and given to the legal institutions of the country no small part of their present colour."[1]

The Psychology of Parties.

Psychologically, party-feeling represents the love of strife which finds expression in war. As Sir Henry Maine put it, "Party-feeling is probably far more a survival of the primitive combativeness of mankind than a consequence of conscious intellectual differences between man and man. It is essentially the same sentiment as that which in certain states of society leads to civil, inter-tribal, or international war; and it is as universal as humanity."[2] Party jargon—campaign, victory, defeat,—is borrowed from the language of war. The excitement which accompanies the counting of heads in an election is a faint reflection of the feelings engendered by the breaking of heads on the field of battle. So long as the primitive combativeness survives in human nature, there will be political parties. There is another psychological reason which leads naturally to the growth of parties. Some

[1] Bryce, *American Commonwealth*, II, 3.

[2] Maine, *Popular Government*, p. 31.

people are cautious by temperament, wedded to the existing order, afraid of a leap in the dark. Others are adventurous, ever gazing at the future, ever aspiring to the conquest of fresh fields. So, the nation automatically divides itself into conservative and radical camps. Since the degrees of caution and adventure differ, you have grades of conservatism and radicalism represented by groups which insensibly shade off into one another. Then there is the question of economic interests which in the present social ordering may differ from class to class, group to group, or place to place. Each section tries to safeguard and promote its own prosperity, allies itself with similar interests and stands forth as a political party. Sometimes, historical accidents and personal ambitions alone may lead to the formation of parties. Finally, there are the religious and racial factors which in many countries enter into the formation of parties. The combinations and permutations of the various elements may produce any number of political groups. In its initial stages in the 17th century, the English parties—Whig and Tory, not to speak of the earlier Cavaliers and Roundheads—were organised on the twofold basis of the church and constitutional government. It has always been supposed that the conservative party is more friendly to the Anglican Church than the Liberal, Radical or Labour groups. France has long had a Catholic party and the Action Liberale frankly bases itself on religion. The influence of religion on politics has largely determined the course of Irish history during the last three centuries. Neither Canada nor even Australia is free from the reactions of the spiritual on the temporal. Czecho-Slovakia illustrates the fusion of religious, economic, racial,

Economic Interests.

Other Causes.

Illustrations.

and temperamental factors in a vivid manner. The General Election of 1920 showed the parties distributed as follows :—

Czecho-Slovak Clubs consisting of :—

Socialists	82
Agrarians	41
Clericals	32
National Democrats	19
Middle Class Party	6
	180

German Clubs consisting of :—

Socialists	34
German Nationalists	10
German Agrarians	13
German Clericals	9
German Democratic Liberals	2
	68
Magyars	2
Magyar-German Clubs	8
Communists	24
Independents	3
Grand Total	285

Italy. The Election of 1919 returned the various groups to the Italian Chamber as follows :—

Socialists	156
Liberals and Conservatives	132
Catholics	101
Democrats	80
Social Reformers	16
Republicans	15
Giolittians	8

Germany. As a result of the Election of 1924, the German Reichstag consisted of :—

Social Democrats	131
Nationalists	103
Centre	69
People's Party	51
Communists	45
Democrats	32
Bavarian People's Party	19
Bavarian Peasant League	17
Fascists	14
Land League	8
Hanoverians	4

Holland. In Holland, the Election of 1922 showed the following results :—

Catholics	32
Social Democrats	20
Anti-Revolutionist Party	16
Christian Historical Party	11
Liberty Union	10
Democrats	5
Other Parties	6

Recent elections in other countries display similar group formations. The tendency to a multiplicity of parties has been strengthened by Proportional Representation but it existed even before its introduction.

The Utility of Parties. There are two services which parties perform in a general election. They select and sift questions and present candidates to the electorate. But for them the voters would be confounded out of their wits by the multiplicity of issues and the plethora of candidates. So it brings order out of chaos. Party rescues the legislature from the dispersion which private interest constantly

occasions. It supplies the member with a code and a programme through which he falls into line with his fellows. Party discipline imposes a wholesome check on self-seeking and corruption. As the numbers of voters and legislators increase and as social distinctions fade away, party leadership becomes more and more necessary. Besides, party may represent the consistent and organic way of applying a social, economic or political doctrine. In his classic defence, Burke stated that it is " a body of men united for promoting, by their joint endeavours, the national interest upon some particular principle in which they are all agreed. " So essential are these services that parties continue to exist even after their basis is knocked out and there seems little difference of principles or method between them. The Democrats and the Republicans in the United States started with a real divergence of views on the relative authority of the Union and the States. The issue was settled and closed by the operation of deeper forces but the parties have survived as fully equipped fighting machines, at their wits' end to create differences. Since they will always be needed for the selection of questions and candidates, they are not likely to disappear. It is true that the first great democracy, Athens, had no regularly organised parties but she was a small city-state. Besides, transitory groups were constantly forming. Nor can the comparative weakness of the party system be pronounced an unmixed blessing for Athens. The city suffered too much from bribery and embezzlement of public funds. After the elections, the parties, in a parliamentary government, facilitate the formation of government. No administration could function if it was not reasonably sure of the consistent support of a majority of the legislature. The extremely useful function of criticism is performed by the party in opposition. So important is this task

that Canada recognises the leader of the opposition as a state functionary and pays him a salary of $ 8,000 a year. As was pointed out earlier, it is this opposition —this alternative government—always exploiting the weakness of the existing regime and always ready to instal itself in office—which constitutes the most effective check on the government. So, politicians must form parties to make government possible and to subject it to organised criticism.[1]

Parties in India.

The inauguration of responsible government will inevitably lead to the rapid development of parties in India. So far, Indian parties have been divided on the nature of the British connection, the method of political agitation, the respective rights and privileges of the majority and minority communities, whether Hindu, Muslim and Sikh or Brahman and Non-Brahman, and occasionally on some economic issues like tenancy legislation. If either of the first two issues—imperial and communal—is left unsettled, it will continue to dominate politics and prevent the clear emergence of other issues to serve as bases of parties. It is after the imperial and communal positions are cleared up and the settlements accepted by the country at large that parties will have

[1] For a full treatment of the organisation and functions of parties, see Ostrogorski, *Democracy and the Organisation of Political Parties*; Bryce, *Modern Democracies*, *American Commonwealth*, vol. II; Lippman, *Preface to Polities*; *Public Opinion*; Lowell, *Public Opinion and Popular Government*; *Government of England*, vol. II; Marriott, *Mechanism of the Modern State*; Sait, *Government and Politics of France*; Brooks, *Government and Politics of Switzerland*; Lowell, *Governments and Parties in Continental Europe*; Hearnshaw, *Democracy at the Crossways*. The periodical publications of party-headquarters in various countries deserve study.

a free development on psychological and economic lines, and intellectual differences of opinion. Religion may even then count for something as it does in some European countries, but it will cease to be a determining issue; it will no longer prevent Hindus and Mussalmans, Christians, Sikhs or Parsis from indiscriminately joining the party which appeals to their economic interests, their social prejudices and their individual temperaments. None can foretell what the exact lines of party division will be in future. Land tenure, protection, tariff, labour *vs.* capital, religious *vs.* secular education, powers of local boards, points of concurrent jurisdiction between the Federation and Provinces, suggest themselves as possible lines of cleavage, but history is full of prophecies and forecasts utterly falsified. All that can be asserted is that regular parties will not grow up until the Imperial and Communal issues are amicably settled and that after it a very rapid development may be expected. Whether India will develop the two-party or the group system is uncertain. Psychological factors will enter largely into the situation. A French writer confesses that "the clearly individualistic and independent spirit of the Frenchman adapts itself with difficulty to the rigorous discipline of British parties." Another Frenchman declared—with obvious exaggeration—that "Frenchmen are rebels to association." A number of Continental writers, indeed, regard the multiplicity of parties as a sign of political maturity, as an indication of vigorous independent political thought. English and American publicists, on the other hand, look upon the two-party system as the manifestation of real political sense. But it is all primarily a question of national temperament and historical accidents.

There has always been a tendency as in the United States, Canada and Australia for federal and state or provincial parties to merge together, not always with the happiest results. In India the economic issues vary so widely from province to province that one may hope for somewhat different bases for federal and provincial parties. In any case the utmost care must be taken to prevent municipal, district and other rural boards and village panchayats from being affected by federal or provincial politics. Party wire-pullers have made American local self-government a byword for all that is low and disgraceful in human nature. Nor can the partial introduction of national politics into local bodies in England be regarded a blessing. The fact is that the problems of local boards are so utterly different from national or provincial issues of policy that the latter are a misfit when applied to the former. They are like that extraneous matter which cannot be absorbed by the body and which tends to throw the system into disorder. In the local boards parties should arise on purely local issues so that they may be held to account for the promises on local improvement which they make to electors. Nothing else will secure an adequate discussion of local needs, an adequate exploration of remedies and an adequate application of effective measures.

Parties in the Federation and Provinces.

Party-feeling moves different people with different degrees of intensity. Behind the regular politicians and ethusiasts on either side stand tepid followers whose ranks gradually merge into the indifferent mass. It is this mass which every party tries to win at an election, which turns the balance on either side and the attitude

Public Opinion.

of which determines the course of public opinion. Public opinion in its essence must be clearly distinguished from mere majority or minority opinion. It is something which stands above party-organizations ; it is not the opinion of a section based on sectional interests, but the opinion which takes account of the welfare of the whole public and advocates the general interest. It represents the mind and conscience of the whole nation and takes a cooler and larger view of affairs than group-organisations do. It is on the strength and the alertness, the instruction and the breadth of this public opinion that the tone of parties, of legislatures, of local boards and of all executives must depend. If it corresponds to the General Will (not merely the Will of All) which Rousseau explained as the *disinterested* will about the *general interest,* if it springs from the Higher Self which idealists regard as the mainspring of truly social action, it will see that the interests of society as a whole are kept in view by the authorities and that power is not perverted in the interests of a class. A perfect public opinion does not exist to-day in any country but to the extent that it approaches the ideal will democracy prove a success. The prime political need of a democracy is that the springs of public opinion should be kept pure, that the public should possess a fairly high standard of intelligence, knowledge, judgment and integrity and that the popular interest in the common weal should be steady and sustained. Democracy which builds political power not on birth or property but on the personality of men should lift and enrich that personality to the n^{th} degree. In the last resort democracy is a problem of ethics and education. The Greeks perceived this long ago. The modern world is coming to the same realisation. The future Govern-

ment of India must, therefore, set out with the ideal of educating every boy and girl as well as every adult to as high a standard as possible. Free and compulsory secondary education forms a plank in the Labour programme in several countries and a rapid approach towards the ideal is being made by Switzerland, Holland and the Scandinavian countries. The Indian State must be a culture state, constantly furthering the intellectual progress of the country. As such it will be in harmony with the spirit of ancient Indian governance. Indian political theory from the Mahabharata downwards always looked upon government as an agency of all-round moral progress. The surviving historical records and the vast mass of epigraphic testimony prove that the Indian State always extended generous patronage to learning and went out of its way, as under Asoka, to lead the people into a higher life. The extension of state-activity which now seems imminent accords with Indian tradition and will provoke no resentment so long as tolerance, another great feature of ancient Indian life, is adhered to. To this task of national uplift, the legislatures, executives and local boards, schools, colleges and universities must address themselves. The education of the masses, "the noblest of causes" as Cobden said, should have the first claim on the public funds. We must educate our masters, as Robert Lowe put it at the extension of the franchise in England in 1867. Nothing else will even remotely counter-act the power of wealth, of which, as Bryce puts it, democracies may say with Dante, "Here we find the great enemy."

Leadership.

Next to mass-uplift, the success of democracy depends on the capacity of society to throw up ceaselessly a number of men and women who join the qualities of leadership to knowledge,

judgment, purity of character and readiness to co-operate with others. Every democracy instinctively perceives the need of guidance and often loves to surrender itself to energetic leadership. Athens under Pericles, England under Gladstone or Disraeli, France under Clemenceau and Poincaré, America under Lincoln and Grant, Czecho-Slovakia under Masaryk, all point to the fascination of leadership. Woodrow Wilson's remark that his country craved for "a single leader" is true of many lands. Leaders need not be philosophers as Plato wanted, but they must be able, in this age of international interdependence, to grasp the significance of world movements, to think on a national and cosmopolitan scale, to plan with vision and foresight. Universities must in a measure become technical schools for leadership in thought and action.

Democracy is not a mere form of government as Scherer and Maine supposed; it is a principle of social organization; it is an attitude of mind; it is a Weltenschaung, an outlook on life. It depends for its sustenance on what lies at the back of institutions. Men have been very slow, says Morley, "in discovering that the forms of government are much less important than the forces behind them. Forms are only important as they leave liberty and law to awaken and control the energies of the individual man, while at the same time giving its best chance to the common weal."[1] It is the deep-lying forces of society that require to be diverted into wholesome channels[2] and enlisted in the cause of harmony, progress and enlightenment.

Conclusion.

[1] Morley, *Miscellanies Fourth Series. Democracy and Reaction*, p. 300.

[2] See Lester F. Ward, *Dynamic Sociology* for some telling remarks on the scientific direction of social forces.

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